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# THE FEDERAL REPORTER.

VOL. 1.

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CASES ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

MARCH—MAY, 1880.

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PEYTON BOYLE, EDITOR.

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## PREFACE.

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THE FEDERAL REPORTER is devoted exclusively to the prompt and complete publication of the judicial opinions delivered in each of the United States circuit and district courts. It publishes both oral and written opinions, and such charges to juries as are deemed of general importance. The copies of the written opinions are in most instances supplied by the clerks, and the stenographic reports of the oral opinions prepared by the authorized stenographers, of the respective courts. In some districts, however, all the opinions, both oral and written, are regularly reported by qualified attorneys, employed specially for that purpose. Each opinion is published in full, and as promptly as is consistent with necessary accuracy. The opinions published embrace many decisions upon subjects of general interest, including railroad cases, questions of jurisdiction, and the interpretation of local laws, as well as decisions in admiralty, bankruptcy, patent cases, criminal law, and those relating to the construction of the federal statutes. In order to present these opinions promptly to the public the FEDERAL REPORTER is issued every week, and each number contains all opinions received and ready for publication at that time. In pursuance of this plan the number of pages in each issue is necessarily unequal, and it is consequently impossible to anticipate with accuracy the number of volumes to be formed by the publication in the course of a year. Each volume, however, will not exceed a thousand pages, and will contain a carefully-prepared index, together with a full table of the cases cited.

It is believed that by this means many able and learned opinions will be rescued from a most undeserved oblivion, while greater uniformity in the interpretation of the federal statutes and the practice of the various federal courts will at the same time be secured. It would seem, therefore, that such an undertaking is not only possessed of great intrinsic merit, but, now that it has been fairly inaugurated, it actually appears to present itself in the light of a public necessity. "A publication that will do this," says the New York Times of June 17, 1880, in commenting on this enterprise, "will be a public boon."

And the same influential journal continues its criticism in the following forcible and well-considered terms: "It is true that volumes of reports have been published, usually by one of the circuit or district judges, and it is also true that an occasional opinion has been given to the public by the law periodicals. But there has been no organized or authorized system of reporting in these courts; many of the cases have not been reported at all, and none of them have been reported with sufficient promptness. If it is of prime importance to secure the prompt and accurate publication of statutes in order that the legal profession and the people may know the laws, it would seem to be hardly less important to apply the same rule to judicial decisions, for these as well as the statutes go to make up the law, and neither clients nor their lawyers can always find out what the law is unless the judicial interpretations of the law are made accessible in public print."

"The plan," says the distinguished circuit judge of the first circuit, "is an admirable one, and the FEDERAL REPORTER will be absolutely indispensable to all practitioners in the courts of the United States, and highly useful to all other lawyers."

"It seems to me," says another learned member of the federal judiciary, "that the value of such a publication can hardly be overestimated, and, if all the judges are willing to give a generous assistance, it will have a strong tendency to produce a much to be desired uniformity of decisions in the various circuits and districts of the United States."

It is not necessary, however, at this time, or in this place, to quote further from the language of bench or bar in confirmation of the advantages and utility of this enterprise. The best recommendation is to be found in the work itself, and the most encouraging reception it has received during the short term of its existence.

The publishers, therefore, confidently submit this new enterprise to the favorable consideration of the members of a busy and arduous profession, who cannot well afford to neglect any means that may serve to decrease their labors, and bring precedents to the aid of principles in the solution of legal problems.

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# CASES

ARGUED AND DETERMINED

IN THE

## United States Circuit and District Courts

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*In re* APPOINTMENT OF "SUPERVISORS OF ELECTION" IN THE  
STATE OF DELAWARE.

(*Circuit Court, D. Delaware.* January 24, 1880.)

U. S. REV. ST. § 2011—WORD "REGISTRATION" CONSTRUED.—The word "registration" used in the U. S. Rev. St. § 2011, has a general, not a technical meaning, and indicates any list or schedule containing a list of voters, the being on which constitutes a prerequisite to vote, unless there is a system of registration described by act of congress, and applied by the act as the only registration of voters under the law.

ASSESSMENT LISTS.—The Delaware assessment lists, made primarily by the assessors of the different hundreds, and completed by the levy courts of the different counties, are such lists, though they contain not only a list of voters, but of other persons besides.

REGISTRATION OF VOTERS—EVIDENCE.—The registration of voters intended by the act of congress need not be conclusive evidence that the person registered is qualified to vote.

LIST OF VOTERS—REGISTRATION OF VOTERS.—The clerk of the peace, in Delaware, is required by the state statutes to make and certify, for the use of the inspector of the election, "an alphabetical list for each hundred, and election district where a hundred is divided into two or more election districts, of the names of all the free white male citizens of the age of twenty-one years and upwards, residing and assessed in such hundred or election district." *Held*, that such list is a registration of voters within the meaning of the above sections of the United States Revised Statutes. Constitutionality of the above statutes not decided.

v. l, no. 1—1

Motion for the appointment of supervisors of election, under the Rev. St. §§ 2011-2015. The United States Statutes and the statutes of the state of Delaware, applying to the case, are set forth in the opinion of the court.

HON. EDWARD G. BRADFORD, U. S. District Judge, assigned by the circuit judge, (Hon. Wm. McKennan,) to perform and discharge the duties devolving upon him, presiding.

*Anthony Higgins*, for the motion.

*George H. Baker and George Gray*, Attorney General, *contra*.

BRADFORD, J. The provisions of the United States laws which it is supposed covers this case are found in sections 2011, 2012, 2013, 2014 and 2015 of the Revised Statutes of the United States, and in these words:

"Section 2011. Whenever, in any city or town having upwards of 20,000 inhabitants, there are two citizens thereof, or whenever, in any county or parish, in any congressional district, there are ten citizens thereof, of good standing, who, prior to any registration of voters for an election for representative or delegate in the congress of the United States, or prior to any election at which a representative or delegate in congress is to be voted for, may make known, in writing, to the judge of the circuit court of the United States for the circuit wherein such city or town, county or parish is situated, their desire to have such registration, or such election, or both, guarded and scrutinized, the judge, within not less than ten days prior to the registration, if one there be, or, if no registration be required, within not less than ten days prior to the election, shall open the circuit court at the most convenient point in the circuit.

"Sec. 2012. The court, when so opened by the judge, shall proceed to appoint and commission, from day to day and from time to time, and under the hand of the judge, and under the seal of the court, for each election district or voting precinct in such city or town, or for such election or voting precinct in the congressional district, as may have applied in the manner herein prescribed, and to revoke, change or renew such appointment from time to time, two citizens, residents of the city or town, or of the election district or voting pre-

cinct in the county or parish, who shall be of different political parties, and able to read and write the English language, and who shall be known and designated as supervisors of election.

"Sec. 2013. The circuit court, when opened by the judge, as required in the two preceding sections, shall therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this title, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge, sitting at chambers, shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

"Sec. 2014. Whenever, from any cause, the judge of the circuit court, in any judicial circuit, is unable to perform and discharge the duties herein imposed, he is required to select and assign to the performance thereof, in his place, such one of the judges of the district courts within his circuit as he may deem best; and, upon such selection and assignment being made, the district judge so designated shall perform and discharge, in place of the circuit judge, all the duties, powers and obligations imposed and conferred upon the circuit judge by the provisions hereof.

"Sec. 2015. The preceding section shall be construed to authorize each of the judges of the circuit courts of the United States to designate one or more of the judges of the district courts within his circuit to discharge the duties arising under this title."

There is no question raised now as to the appointment of supervisors of election to guard and scrutinize the elections. But it is denied that there is any registration of voters within the meaning of the act of congress, and that therefore the appointment of supervisors of election, with power to guard and scrutinize the assessment lists in the hands of the assessors and in the hands of the levy court, and the list of voters furnished by the clerks of the peace in the respective

counties of the state for the use of the inspectors of election, is not warranted by law.

As this law, leaving out the question of constitutionality, is meant to be fair and impartial in its operation, and as its object and purpose is the protection to each citizen of the right of the elective franchise, both by securing his own vote and preventing the illegal votes of others, the construction of the act should be a liberal one, and such as to carry into effect the manifest intention of the framers of the law. And, while the fact of penalties attached to the violation of the law should, as in every case demanding serious investigation, make more imperative the necessity for the judge to give a careful investigation to the case, I know of no rule of interpretation arising from that fact which should require a narrow and technical construction to such a statute—a statute which is eminently an enabling one.

We are then brought to the consideration of the question, what was the manifest intention of congress in the use of the words "registration of voters?"

It will hardly be denied that, if these lists made by the assessors and the levy courts are lists of such a character that to be placed on them is a prerequisite to the right to vote, the guarding and scrutinizing such lists give the means of remedying the evil which congress designed to be remedied. And if it is a sound rule of interpretation or construction of a law that such a construction or interpretation should be given as will remove the evil sought to be removed, and protect the rights sought to be protected, then, unless there is something on the face of the acts of congress which in terms denies the applicability of the registration of voters therein named to the assessment lists under the laws of Delaware, an adherence to this rule would compel the court to give to such a system the substantial character of a registration of voters.

It is admitted in argument that if there was a system of registration of voters *eo nomine*, in this state, then the statute would apply, and the supervisors could guard and scrutinize such lists.

Now such registry lists, *eo nomine*, are imperfect; they only make a *prima facie* case. No voter's right is extinguished by being omitted from that list, and no voter's right is secured by being illegally placed on it. The wrong done can be remedied at any time prior to the election; and yet such imperfect lists as these, under the name of registration of voters, congress, in the interests of the purity of the elective franchise, has ordered to be guarded and scrutinized. Now suppose, under the system of laws of the state of Delaware, the assessor makes list of persons owning and not owning property, above the age of 21 years, and is required by law under severe penalties to place on that list every freeman in his hundred above the age of 21 years; and suppose, after the the list is completed and corrected by the levy court in the latter part of March of every year, it is found that citizens qualified in every other respect to vote have, through inadvertence or corruption, been omitted from the lists; and suppose that omission is fatal, beyond the possibility of correction—an actual and utter extinguishment of such a citizen's right to vote—can it be held with any reason that such a state of facts does not constitute a registration of voters within the true meaning and intent of congress? It is admitted by counsel for the objectors that the law will apply to imperfect and inconclusive lists of voters, provided they are called by law “registration of voters;” but to apply that law, when the necessity of guarding and scrutinizing is vastly increased, from the fact that the omission of the name from the assessment list is absolutely without remedy, is held by them to be unwarranted.

Now, what is there in the words “registration of voters” that should require such a construction of the law as to defeat the manifest intention of congress? It will be borne in mind that there is no such expression as “system of registration” or “registry laws,” and the only words to have a construction given to them are “registration, if one there be.” What is registration? It is the act of making a list, or catalogue, or schedule, or register. The word “registration” is an ordinary one; it is used in a generic sense, not technical;

and, when applied to voters, unless there is a system of registration described by act of congress as such, and applied by the act as the only registration of voters under the law, it is any list, or register, or schedule containing names, the being on which lists, registers, or schedules constitutes a prerequisite to voting. Any other construction would utterly defeat the purpose and intent of congress.

It is manifest that, under the construction contended for by the objectors, any state having in substance such a registration of voters could avoid the operation of the act by altering the name of the fact of registration, or altering the state laws in such a manner as to create a system of registration different from that contemplated by the act of congress, as likely to be most prevalent in the majority of the states. The registration of voters must be widely variant in different states of the Union, and because there are some acts which, under our system, supervisors may not be able to perform, but which, in the contemplation of congress, might be performed in some other states, it does not follow that the former states have no such registration of voters as was contemplated by the act of congress. Is there *fit* and sufficient subject-matter for this act to work upon, is the pertinent question, and not—have we such a system of registration in all particulars as congress contemplated might exist in some of the states? The constitutional provision in reference to voting is in these words:

Art. 4. And in such elections every free white male citizen of the age of 22 years or upwards, having resided in the state one year next before the election, and the last month thereof in the county where he offers to vote, and having, within two years next before the election, paid a county tax which shall have been assessed at least six months before the election, shall enjoy the right of an elector; and every free white male citizen of the age of 21 years, and under the age of 22 years, having resided as aforesaid, shall be entitled to vote without payment of any tax.

The laws of the state governing the duties of assessors and the levy court are to be found under the titles "Levy Court," on page 60 and following, and of "Assessors," on page 78 and

following, and under title of "Valuation of Property," and in other places, in the Revised Statutes of Delaware, which we do not deem necessary to quote at large, an examination of which will, we think, show the truth of the following propositions:

1. There are officers appointed to make lists of voters, or to put on the assessment lists the names of persons who, if not thus assessed, will, though entitled in all other respects, be deprived of the right of voting.

2. Those officers are the assessors for the different hundreds and the levy courts of the different counties.

3. There are not only lists such as have been spoken of, and men authorized to make them, but there are times and places fixed by law for their examination, investigation, addition to and correction.

4. The laws of Delaware contemplate their being guarded and scrutinized by its own citizens.

5. There are times and places fixed by law for guarding and scrutinizing those lists in the hands of the assessor, from the tenth day of January to the last Saturday in that month, and in the levy court during the months of February and March.

6. Before the assessor, objections or challenges to a name being put on the lists can be made, and he is bound to entertain those objections, (for if he fraudulently places names on his assessment lists he is liable to indictment,) and on the proper application and evidence he is bound to place names on his lists which have been omitted.

7. The levy court is bound to entertain applications for placing names omitted on the assessment lists, though it may not take any off which may have been returned by the assessor. So that here is time and place for guarding and scrutinizing.

8. The clerk of the peace is bound to "make and certify, for the use of the inspectors of the election, in the month of August in each year of the general election, *an alphabetical list*, for each hundred and election district where a hundred is divided into more than one, of the names of all the

free male citizens of the age of 21 years and upwards residing and assessed in such hundred or election district." He shall write the word "naturalized" opposite the name of any one on said list who appears from evidence in his office to have been naturalized; and here, by this officer, is virtually made a registration of voters—a list making a *prima facie* case of right on the payment of tax—a list given to and used by the inspector of elections for that purpose, whose duty it is made to write the word "voted" opposite the name of *every one* who has voted.

It will be noticed that the clerk of the peace does not simply take from the assessment lists in his official custody the names of those assessed, but he also has to decide and fix on the residence of the persons on this list, and certifies the place of residence, as well as the fact of assessment, thus making a *prima facie* case of right to vote on the payment of a tax. Now this is not a complete registration or list of voters, because of the possible change of the residence of voters after the first of September, or from other causes, but it is as complete as the clerk of the peace can make it, and is in close analogy, and, indeed, almost identical with lists of voters made out under a system of registry laws, *eo nomine*, which exists in Pennsylvania; the only substantial difference being that *there* the assessor makes out the list of voters from the *assessment* lists *he* has previously made, and here the clerk of the peace makes out the list of voters from the assessment lists which have been made by the assessors, perfected in the levy court.

Why is not this list made out by the clerk of peace such an one as should be guarded and scrutinized? It is made by a public officer, charged with the performance of a duty, who has office hours and a known place for the transaction of public business. If he is a dishonest and unprincipled man he has the means of perpetrating great frauds, and in no way more easily than by placing on this list of voters men who are not assessed.

We have argued this question hitherto on two grounds: *First*, that it was necessary to give such a construction to the



term "registration of voters," as used by congress, as to embrace the system of laws in the state of Delaware governing the assessment of her citizens, in order that the manifest intention of congress should be carried out; and, *second*, we have endeavored to show that while congress may have contemplated provisions of registry laws existing in other states, which have no existence here under our system, there still remains sufficient subject-matter to make the application of those laws simple, practicable and easy. Under these circumstances, unless I can find in the argument of counsel insuperable objections, I shall be compelled to give such a construction to our laws as to give them substantially the character of a registration of voters as contemplated by congress.

It is urged by both the counsel for the objectors that the registration of voters, to meet the requirements of the act of congress, must be a registration of voters "*qua* voters" or "as voters" alone, and one of counsel goes so far as to say it ought to be conclusive evidence of all the qualifications of the voters, or the act of congress would not embrace it as a "registration of voters."

This latter idea is thoroughly refuted by the settled practice and construction of the registration laws of Pennsylvania, which afford no conclusive evidence of a man's right to vote if upon it, or of the deprivation of a man's right if not on it, as will appear from Purdon's Digest of Pennsylvania Laws, too voluminous to be here cited (see chapter "Elections," Annual Digest for 1873-78).

But have we not shown already that the clerks of the peace in each county, by authority of law, make up lists of voters as *such voters* affording *prima facie* evidence of the right to vote upon the payment of tax, for the use of the inspectors of election in each election district in the state? Can it be said that that is not a list of voters on which, by requirement of law, the word "voted" is to be marked opposite the name of every person who does vote; and when these lists are to be retained for the purpose of evidence of the fact of voting?

An examination of the statutes hereinafter cited of the

state of Delaware, referring to the action of the clerks of the peace in making out these lists, will show that he performs other than mere clerical duty in taking names from the assessment lists; in fact, some of them are *quasi* judicial, such as determining the fact of naturalization of foreigners, and determining and certifying to the residence of all persons assessed. They are in part as follows:

"Section 21. He shall make and certify under his hand and official seal, and deliver to the sheriff of his county, in the month of August, in the year of holding the general election, an alphabetical list for each hundred, [and election district where a hundred is divided into two or more election districts,] of the names of all the free white male citizens of the age of 21 years and upwards, residing and assessed in such hundred [or election district;] and when it appears by any certificate recorded in his office that a person named in said list has been naturalized he shall write the word 'naturalized' opposite his name. If the general election be not held in any year on the same day as the election for electors of president and vice president, he shall, in that year, make, certify, and deliver two such lists.

"Section 5. The said alphabetical list shall be made and certified by the clerk of the peace of the county, under his hand and seal of office; and, as to every person whose name shall be contained in such list and who shall appear by any certificate recorded in the office of said clerk to be naturalized, the word 'naturalized' shall be distinctly affixed to the name of every such person. Such alphabetical list shall be delivered by the clerk of the peace to the sheriff on some day in the month of August next preceding the general election.

"Section 18. Each qualified elector shall deliver a single ballot, containing the names of the person voted for, to the inspector, who shall audibly pronounce the name of the elector, which shall be entered in words at length upon a list of polls to be kept by each of the clerks, whom the judges shall direct to that duty, and one of the judges shall write against it, on the alphabetical list delivered by the sheriff to the inspector aforesaid, the word '*voted.*' There shall be no

examination of a ballot, except to determine that it is single; and the inspector shall, immediately after pronouncing the elector's name, put the ballot into the box in his presence, unless the vote shall be objected to.

"Section 33. Each inspector shall, on Thursday preceding the day of the general election, deliver into the office of the clerk of the peace of his county the oaths or affirmations that shall have been signed by the inspector and judges of the election in his hundred, and the certificate of said oaths or affirmations being administered, to be made and signed as directed in the thirteenth section, and the two lists of the polls kept at the election as before directed, and the alphabetical list aforementioned, with the notes of 'voted' as the same shall have been made thereon; all of which shall be filed in the office of said clerk, and shall be public records, and as such admissible as evidence."

Now, on a comparison of the two systems of Pennsylvania and Delaware, in what respect does the Pennsylvania assessor present on his list of voters a stronger case of *prima facie* right to vote than does the clerk of the peace on his? By the former law the assessor makes out from his own assessment an alphabetical list of persons entitled to vote. By the law of Delaware the clerk of the peace makes out an alphabetical list from the lists of the county in his official possession of all freemen over the age of 21 years "residing and assessed in each hundred or election district." The assessor in Pennsylvania enters the letter "N" opposite the names of naturalized persons; the clerk of the peace writes the full word "naturalized" opposite the foreigner's name. The Pennsylvania assessor is required to write the word "vote," while the inspectors of election in Delaware write against each name the word "voted," as the act of voting takes place.

So it will be seen there is a great similarity between these two systems, and my last proposition on this subject is this, that if the test of the character of the list as made out by the clerk of the peace as a *list of voters* is the making a list presenting a *prima facie* right to every one on the list to vote on the payment of a tax, then that test is found as fully to

exist in the lists made by the clerk of the peace as in the registration of voters made by the assessor under the Pennsylvania laws. But it has been argued by the objectors that even if these lists made out by the clerk of the peace were lists of voters, the guarding and scrutinizing must be confined to the action of the clerks of the peace; that it cannot be extended to the action of the hundred assessors or the action of the levy court.

The answer to this is a simple and easy one. The determination of the essential element of the right to vote, an indispensable prerequisite, viz., that of assessment, by the constitution of the state, is primarily made by the assessor, and finally determined by the levy court in the completion of their assessment lists, and that determination, expressed by the act of assessment itself, becomes incorporated into and a part of that list of voters made out by the clerk of the peace. A denial, therefore, of the right to guard and scrutinize the action of the assessors and the levy court in that respect would be fatal to the right of the voter, as the period and opportunity would have passed by when he could claim his right to be assessed—the essential prerequisite, as before stated, of the exercise of the right of suffrage.

The attorney general, Mr. Gray, assumes that we have no registration of voters within the meaning and intent of the act of congress, and then argues that the acts of the assessors and members of the levy court cannot be guarded and scrutinized under any of the provisions of section 2011, or congress would have added the comprehensive language of section 2005.

But, as I have shown that we have in substance a registration law within the clear meaning and intent of the act of congress, the argument can have no application.

Both of the counsel contend that the lists in the hands of the assessors and in the hands of the levy court are not lists of voters, because in addition to the voters others are assessed, such as females and non-residents. Now, while it may not be a list containing all the qualifications of voters, it is a list which embraces the names of every one having the prerequi-

site qualification of assessment, an omission from which deprives one entitled to be on it of the right of voting. It may not be, in the estimation of counsel, a list of voters, but it has this great significance of being such a list that any man not found upon it is deprived of his right to vote.

Thus these lists have a dual aspect, and are as much a list of voters as of assessed persons. This supposed difficulty does not apply to the lists of voters made out by the clerks of the peace.

The learned attorney general, whose opinion is entitled to great respect by reason of his official position and well known ability as a lawyer, has insisted that it would be impossible to enforce the criminal proceedings of the sections of the United States Revised Statutes regarding obstruction or hindrance of supervisors so appointed; holding that no indictment to cover such an offence could be drawn because the warrant claimed for the authority of these supervisors cannot be found in the United States Statutes. With all respect to the learned attorney general, this is begging the whole question. If there is substantially a registration of voters in this state within the true meaning and intent of the act of congress, as we have already indicated there is, there would be no difficulty in framing an indictment against any state officer charged with the duties of registration of voters, either under the section in question or under section 2005, for any obstruction or hindrance to supervisors in the performance of the duties imposed on them by congress.

I have thus at some length argued the novel and interesting questions which have been presented for my solution. I may have erred in the conclusion at which I have arrived. If I entertained doubts of the correctness of my conclusion which were not of the gravest character, I should feel bound to give the benefit of those doubts in favor of that construction which was in good faith intended to purify and protect the elective franchise rather than that which would curtail and diminish the opportunity of doing the same. If I am right in my conclusion I would do a great wrong in not making these appointments, while, if I err in my legal judgment,

no injury is done to any one—no man's rights are invaded or affected injuriously by the appointments—and ample opportunity will be given, before a full bench, on full argument, to have this disputed question finally determined. I shall therefore make the appointments of supervisors of election as suitable names shall be presented to me by the chief supervisor of elections for this district.

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MICON, Administratrix, etc., v. LAMAR, Executor, etc.

(Circuit Court, S. D. New York. January 2, 1880.)

GUARDIAN AND WARD—CIVIL WAR.—A guardian appointed by a surrogate court in the state of New York, who, together with his ward, was subsequently domiciled in a southern state during the waging of the civil war, was bound in good faith to keep his ward's money and its accumulations safely during the war, and to account for such property at its close.

SAME—REMOVAL OF TRUST FUND—CONFISCATION.—A guardian cannot lawfully remove the property of his ward in order to save it from confiscation by the United States government.

SAME—NEW GUARDIAN—RELEASE.—A new guardian may be appointed before a former guardian has been discharged, where such guardians are resident in separate state jurisdictions. A release from such new guardian will not, however, relieve the former guardian from liability, where such former guardian has unlawfully invested the funds of the ward.

SAME—RATIFICATION BY WARD.—The ratification by a ward must be made with a full knowledge of all the facts, and a full understanding of all legal rights, and the same must be clearly established by the evidence.

SAME—NEXT OF KIN—ESTOPPEL.—The acts and admissions of the next of kin of the ward, made during the life-time of the ward, are not subsequently binding upon such next of kin when she becomes the administratrix of such ward.

SAME—INVESTMENT—INTEREST WITH ANNUAL RESTS.—Where a guardian unlawfully invests trust funds, he is liable to make good the amount invested, together with interest and annual rests.

*S. P. Nash and G. C. Holt*, for plaintiffs.

*E. N. Dickerson and C. C. Beaman*, for defendant.

CHOATE, J. This was a suit brought by the plaintiff's testatrix, Ann C. Sims, in the supreme court of the state of New

York, against the defendant, as executor of Gazaway B. Lamar. The case was removed into this court by the defendant, and the plaintiff having died, the suit was revived in the name of the present plaintiff, her administratrix.

The complaint alleges that on the twenty-first day of December, 1855, the defendant's testator, Gazaway B. Lamar, was duly appointed, by the surrogate of Richmond county, guardian of the said Ann C. Sims, then an infant of about four years of age, and then residing in said county of Richmond; that he accepted said trust and gave bond as required by law; that on or about January 1, 1856, he took into his possession all the property of said infant, being more than \$5,000 in cash and other property; that he never, during his life-time, rendered an account of said guardianship to the surrogate of Richmond county, or to any court having cognizance thereof, or to the plaintiff; that the said infant has become of full age and has demanded an account, which the said guardian and his executor have neglected to give. The prayer of the complaint is for an account and payment of the balance found due.

The answer of the defendant avers that the said Gazaway B. Lamar was a citizen of Georgia, and said infant was a citizen of Alabama, having a temporary residence in the city of New York, when the said Lamar was appointed guardian of said infant, as alleged in the complaint; that in the year 1861 the states of Georgia and Alabama declared themselves to have seceded from the United States, and to constitute members of the so-called Confederate States of America, whereupon a state of war arose between the United States and the Confederate States, which continued to be flagrant for more than four years after the spring of 1861; that the said Lamar and Ann C. Sims were, in the spring of 1861, citizens and residents of Georgia and Alabama, respectively, and citizens of the Confederate States, and were engaged in aiding and abetting the state of Georgia and the Confederate States in their rebellion against the United States, and so continued till January, 1865; that the United States, by various public acts, declared all the estate and property of

the said Lamar and the said Ann C. Sims to be liable to seizure and confiscation, and they were outlawed and debarred of any access to any court of the United States, whereby it was impossible for the said Lamar to appear in the surrogate's court of Richmond county, to settle and close his accounts there, and to be discharged of his liability as guardian, in consequence whereof the relation of guardian and ward ceased and determined, so far as the same depended upon the order or decree of said surrogate's court; that, for the purpose of saving the money and property of said Ann C. Sims from seizure and confiscation by the United States, the said Lamar, at the request of said Ann C. Sims and of her natural guardians, all citizens of Alabama, withdrew the funds belonging to her from the city of New York, where they were declared to be forfeited and confiscated, and invested the same, for her benefit and account, in such securities as, by the laws of Alabama and Georgia and of the Confederate States, he might lawfully do; that on the fifteenth day of March, 1867, at the written request of said Ann C. Sims and of her natural guardians, one Benjamin H. Micon was appointed her legal guardian by the probate court of Montgomery county, in the state of Alabama, where she then resided, and that said Lamar accounted with and paid over to said Micon, as guardian, all the estate with which he was chargeable, as guardian, and received from the said Micon, as guardian, a full release therefrom, and that the said Ann C. Sims ratified and confirmed the same when she became of age.

A similar suit was brought by Ann C. Sims, as administratrix of Martha M. Sims, her sister, of whom the said Lamar was at the same time appointed guardian. Martha M. Sims died in 1864, at the age of 15 years, unmarried and intestate, leaving the said Ann C. Sims her next of kin. The complaint in this second suit states a cause of action similar to that stated in the suit of Ann C. Sims. The answer in this case states the same defences of the dissolution of the relation of guardian and ward by the war; the withdrawal of the funds to save them from confiscation. It also avers that



all the rights of Martha M. Sims vested at her death in Ann C. Sims, and that the settlement with Micon as guardian, and his release, discharged the said Lamar from all liability as guardian of Martha M. Sims.

After the revival of these suits in the name of the present plaintiff, cross suits were commenced in this court, by the defendant against the present plaintiff, setting up the same defences as in his answer to the original complaints, and further averring that the present plaintiff is the sole legatee under the will of Ann C. Sims, and entitled to receive in her own right whatever shall be recovered in these actions, and that the present plaintiff, as one of the natural guardians of said infants, approved and ratified all the acts of said Lamar as their guardian, and is therefore estopped to deny that those acts were in all respects legal and proper. The present plaintiff, in her answers in the cross suits, denies that she was one of the natural guardians of said infants, and denies the approval and ratification of the acts of the guardian.

The four suits have been tried together upon an agreed statement of facts.

The appointment of defendant's testator as guardian of the two infants by the proper court of the place of their domicile at the time of the appointment, and his receipt soon afterwards of moneys belonging to his wards, are admitted. The condition of his bond, which is made a part of the complaint is, that he "will faithfully in all things discharge the duty of a guardian according to law, and render a true and just account of all moneys and property received by him, and of the application thereof, and of his guardianship in all respects, to any court having cognizance thereof, when thereunto required." The letters of guardianship appoint the general guardian of the person and estate of said minor "until she shall arrive at the age of fourteen years and until another guardian shall be appointed," and requires him "to safely keep the real and personal estate of said minor, and not to suffer any waste, sale or destruction of the same, etc., and to deliver the same to her when she becomes of full age,

or to such other guardian as may be hereafter appointed, in as good order and condition as when received, and also to render a just and true account, etc., in any court having cognizance thereof, when required."

The court to which the ward resorted for an account and relief was a court of general equity jurisdiction, and therefore a court having cognizance thereof, and the causes of action alleged in the complaint are fully sustained by these admitted facts, unless the matters alleged in the answer are, if sustained by the evidence, valid defences to the guardian.

1. The first ground of defence insisted on is that by the war the relation of guardian and ward was terminated, and hence it is argued that though the former guardian continued to hold upon some kind of a trust the assets which he had received as guardian, yet that he no longer held them as guardian under and according to the laws of New York; that the guardian and ward having both acquired new domiciles out of this state and within the territory of what became, at least pending the war, an alien and a hostile state, this personal domestic relation was thereby wholly broken and did not revive when the war ceased, and the guardian was no longer accountable to the courts of New York as guardian, even after the close of the war.

I can see no ground whatever for this position, so far as concerns the care and safe-keeping of the property of the ward in the hands of the guardian, and his liability to account for it after the war was over. Doubtless during the war, if the guardian had remained there and his ward had become an alien enemy, his duties as guardian would be modified by that fact. He could not properly or legally remit funds for her support to any person in the hostile territory. But he would still be under the same obligation as before as to the safe-keeping of the property, and, whenever the ward ceased to be an alien enemy by the termination of the war, there was no legal obstacle to her calling the guardian to an account for the property so held. Even if the war dissolved the relation, the effect of such dissolution would not be greater than would be that of the termination of the guardianship by the death

of the ward; and if the ward had died before the war began, the guardian must still account to her legal representative. If he ceased to be guardian, he still remained a trustee of the property upon precisely the same trusts as to its safe-keeping, and under the same liability to account for it according to the tenor of his appointment and bond, as before. The case of a copartnership between citizens of hostile states, being dissolved by war, is cited as controlling this case. If it were wholly analogous, which it does not seem to be, I do not perceive that it would touch the present question.

By the acceptance of his appointment and his bond the defendant's testator undertook and agreed to do certain definite things with the funds he received—to keep them invested in a certain way which the law prescribes, and to account for them when required. It is alleged that he has failed to do so. It certainly is no answer for him to say that of his own free will he made himself an alien enemy of the state of New York and of the United States, and thereby discharged himself from the obligation thus assumed under the laws of New York. Yet this is what this defence amounts to, so far as it rests on his becoming a resident of Georgia, and as such engaging in the war against the United States. So far as this defence rests on the words "being an alien enemy," her right to call him to account in respect to the funds received by him as guardian before the war was suspended, not annulled, by the war.

In *Insurance Co. v. Davis*, 95 U. S. 430, the supreme court say: "If the agent has property of the principal in his possession or control good faith and fidelity to his trust will require him to keep it safely during the war, and to restore it faithfully at its close." If this is so of an agent it must certainly be said, with equal force, of a guardian, that good faith and fidelity to his trust will require him to keep his ward's money and its accumulations safely during the war, and to account for it at its close. Nor can the guardian better his position in this respect by himself voluntarily going into rebellion, as this guardian went from New York to Georgia to join in a rebellion, for he could not, by any act of his

own, short of the complete discharge of his duty, relieve himself from his liability.

2. The next defence urged is that the guardian, to prevent the confiscation of the ward's money, withdrew it from its investment in bank stock in New York, and sent it to Montreal, Canada, where it remained invested, by his direction, in the bonds of cities within the rebel states, and in southern railroads. This point is clearly untenable. It is not contended that the new investments made were such as a guardian is allowed to make, according to the laws of New York, and they were obviously extra hazardous. They are not to be justified on the plea that if the funds had remained here, invested according to law, they would be liable to be confiscated by the United States.

It is no part of the duty of a guardian to protect his ward's money against the lawful demands of his own government. If under such lawful demands they are seized, the guardian would no longer be responsible for them. His duty as a citizen, to interpose no obstruction to his own government in carrying on war, is his first duty. It is superior to any obligation he owes to his ward. If his ward's money was forfeited to the United States, he had no right nor duty to prevent, by its removal, the superior rights of the government over it from being asserted. Moreover, the proofs show that what he did was, under color of protecting his ward's interests, to allow the funds to be loaned to cities and other corporations which were aiding in the rebellion, and by this very act, set up in excuse, he gave aid and comfort to the enemies of his government. Such an act could not be pleaded in justification, because in itself unlawful, even if the circumstances warranted a removal of the fund to avoid confiscation, which clearly they did not.

3. Another ground of defence set up is the transfer of what remained of the fund in 1867 to a new guardian in Alabama, and his alleged release of defendant's testator. At the time of the appointment of Mr. Micon guardian by the Alabama court the infant, Ann C. Sims, was domiciled in that state. The appointment was made upon her written request, and,

as it appears by the statutes of Alabama, put in evidence, it was in all respects in conformity with those statutes, and by a court of competent jurisdiction. It is objected on the part of the plaintiff that a new guardian cannot be appointed till the former guardian is removed or superseded. This may be the rule where both guardians are appointed within the same jurisdiction. There seems, however, no legal objection to there being several guardians in several different states if the infant has property in different states which requires the care of a guardian.

The defendant's testator was appointed guardian of the person and property of the infants. When they removed from the state of New York, which they did with the relatives with whom they lived in the year 1856, his duty and power as guardian of the person may have ceased, or been suspended at least, until they might return, on the ground that his appointment under the laws of New York would give him no power to control their persons beyond the local jurisdiction of those laws; and when the infants became, as they did, domiciled in Alabama, I think the power of the state of Alabama to provide by law for the appointment of a guardian of their persons, and of such property as they might have within its jurisdiction, cannot be questioned.

The fact that there was already a guardian of some of their property in another state or country is not inconsistent with the exercise of this power; and it would certainly be most proper, and in many cases convenient, and for the true interest of the infant, that in case of a change of domicile a new guardian should be appointed within the new jurisdiction; and a transfer of funds from a former guardian to the new guardian appointed in the state of the infant's domicile might be very properly authorized by the court to which the former guardian is accountable, upon the same principles of equity and comity on which the transfer of funds in the hands of an executor or administrator, to an executor or administrator in another state, may be authorized. *Parsons v. Lyman*, 20 N. Y. 103.

In the present case the former guardian, Mr. Lamar,

requested of the near relatives of the infant the appointment of a new guardian. His reasons were his age and growing infirmities, and his own business cares and perplexities; and the appointment was asked for and made in accordance with his request. The reasons were valid and sufficient, and the circumstances made it proper that the new guardian should be appointed in Alabama, and I cannot doubt that if the defendant's testator had applied to the surrogate's court, of Richmond county, for leave to resign his trust and to transfer the ward's estate to the duly appointed guardian in Alabama, his petition would have been granted. What would thus have been approved as just and right if asked for, can now be justified as done for the benefit of the ward.

Therefore, in any accounting to be had, the defendant's testator should be credited with his cash payment to the new guardian of \$808.70. But beyond this the transaction referred to as a settlement with and release of the defendant's testator by the new guardian neither purported to be, nor could, if so understood and intended by the parties, be a release of the former guardian of his liability to account for the residue of the infant's estate with which he was chargeable. The new trustee merely gave a receipt for sundry securities, mostly worthless, which the defendant's testator turned over to him. They were the remains of the investments which had been made of the ward's property. But the original investments being in bank stock had been not such as the ward was, when of age, bound to accept, and by the changes of value effected by the war; and by the reinvestments made in consequence of the war and during the war the result was that the rest of the fund consisted of bonds of southern cities and southern railroads, of little value.

It is too plain for argument, it seems to me, that a new guardian has no power to accept a transfer of such properties as a full discharge of the former guardian's liability to account for and make good the moneys originally received. Such an act would be a gross abuse of his trust by the new guardian. No court would authorize or justify it, and certainly a guardian has no power, by virtue of his appointment,

thus to give away the property and rights of his ward. If the new guardian has actually realized anything from the securities transferred, I see no reason why, in the taking of the account, defendant's testator should not be credited with it.

4. The defence of a ratification by the ward is not made out by the evidence. Such a ratification must be very clearly proved, and it must appear that it was made with full knowledge of all the facts and a full understanding of the legal rights of the ward affected thereby. *Adair v. Bremmer*, 74 N. Y. 539-554. Neither of these circumstances is shown in this case. It is true that Ann C. Sims, in 1867, made a written request for the appointment of a guardian in Alabama, in place of her former guardian. She was then about 16 years old. She came of age June 1, 1872, and commenced this suit July 1, 1875. She was not shown to have done any act waiving her claim meanwhile. It is true that her uncle and aunt Micon, with whom she lived, had written letters expressive of their gratitude to the defendant's testator for doing as well by their niece as he had done, but these letters do not bind the ward, and if they did they are not shown to have been written with a full knowledge of the ward's rights.

5. The additional defence set up in the cross suits is also untenable. Mrs. Micon, the present plaintiff, at the time the alleged acts of approval by her were done, did not stand in the relation of a natural guardian to the infants, having any power as such over their estate. She was their aunt, and after the death of Martha M. Sims she was one of the next of kin of the surviving infant, Ann C. Sims. A guardian upon whom the law throws the real responsibility for the proper and legal investment of his ward's money cannot relieve himself from that responsibility by pleading the advice, direction or approval of his ward's relatives, however near; and Mrs. Micon, before the death of Ann C. Sims, had no such interest in the estate as would make her admissions and acts binding on her, when afterwards she became the administratrix of Ann C. Sims. Nor is the evidence of ratification and approval satisfactory, even in respect to the present plaintiff, for the reasons above stated.

6. Although the defendant's testator acted without any other real purpose, as it seems, than to do what he thought for the best interest of his ward, yet he took the risk of investing the funds in a manner not allowed by law, and he must therefore make good the amount received, with interest and annual rests. *King v. Talbot*, 40 N. Y. 76. The fact that down to the time of the war there had been no depreciation in fact is immaterial. The ward may now elect to reject the investments altogether. The guardian is to be allowed all payments made by him for the support and education of the infants, as the same appear on his account rendered, which are admitted to be in that respect correct.

7. The defendant's testator received for his wards from time to time a certain proportionate part of the dividends on stock of the Mechanics' Bank, a Georgia corporation. The plaintiff insists that the defendant's testator should be charged with the infants' proportionate part of the value of this stock. The evidence is not sufficient to show what interest, if any, the infants had in this stock, or whether the defendant's testator could, by appropriate proceedings in the courts of Georgia for ancillary letters of guardianship, or otherwise, have obtained possession as guardian of this interest. If he could have done so it seems that it would have been his duty to do it (*Schultz v. Pulver*, 11 Wend. 361;) but this question will more properly arise when an account shall have been taken and the facts are all before the court.

Decrees for an account in the original suits, and dismissing the bills in the cross-suits, with costs.

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### SAWYER v. HORN.

(Circuit Court, D. Maryland. January 17, 1880.)

TRADE-MARK—FRAUD—INJUNCTION.—A court of equity will restrain the fraudulent imitation of a package and label, although they do not technically constitute a trade-mark, where the public are thereby misled into purchasing the goods of the imitator as those of the original manufacturer.



MORRIS, J. The bill alleges that the complainant, Henry Sawyer, of the city of Boston, in the state of Massachusetts, has been for about 20 years engaged in the manufacture of bluing; that his bluing has an extended and desirable reputation in the markets of the United States, and especially in Baltimore, where it has been and now is regarded as an article of great excellence, and has been sold in Baltimore and elsewhere in large quantities.

That in order to identify the bluing made by him and distinguish it from all others, complainant devised and adopted, as a trade-mark, certain marks, symbols and devices, and a form of package, none of which had been before at any time applied or used in connection with bluing, and which have continually, ever since, been used by him to identify his bluing.

That the marks so adopted were:

1. A red disk, applied on the top of the box, which had been first used by him in 1863, and had been registered by him, according to the statutes of the United States, as a trade-mark.

2. Certain pictorial representations of his boxes, which he used as part of the labels, applied to the outsides of the packing boxes, in which the small boxes containing the blue were packed for market.

3. An allocation or combination, consisting of words printed in bronze letters on blue paper, constituting the label surrounding the small boxes containing the blue.

And also a new and original and peculiar form of package or box to contain the blue, consisting of a cylinder, having a top of metal, perforated with holes, sealed with red sealing-wax.

Also a packing box with certain distinctive labels before mentioned, in which the cylindrical boxes were so packed and arranged that upon being opened nothing was exposed to sight but the red tops.

And the bill charges that the respondent Horn is engaged in Baltimore in the business of manufacturing blue, and, knowing the high reputation of complainant's goods as iden-

tified by his said marks and labels and peculiar appearance, has for his own profit, and to the injury of the complainant, been selling bluing put up in boxes made in imitation of complainant's, and had attached to the boxes palpable imitations of complainant's trade-marks.

And that said respondent, Horn, had wilfully and fraudulently put up his bluing in packages substantially the same in every material respect and having substantially the same general appearance as those of complainant, and had packed the same in the precise form and manner originated and used by the complainant, and had sold the same as and for the bluing of the complainant.

The bill further alleges that the respondent's imitation of the complainant's peculiar form of package, labels and manner of packing created confusion in the market, and misled and deceived purchasers who were familiar with and desired to obtain complainant's goods, and that respondent's goods were inferior and sold at a less price than complainant's.

The bill prays for an injunction and account.

These are in substance the more important allegations of the bill.

The respondent's answer admits that the complainant is a manufacturer of bluing as alleged, but denies that prior to 1878 the complainant ever claimed any of the alleged symbols, marks, or form of package as his trade-mark, or that he has ever attached to his bluing anything in the nature of a trade-mark, except the *fac simile* of his signature, the dates of the patent and reissue obtained by him, and the word "Crystal;" and respondent alleges that the red top of the boxes, the blue color of the label, the lettering, type, phraseology, green box, and other matters claimed by complainant in his bill, are such as belong to commerce and the public in general, and are not susceptible of exclusive appropriation by any one.

Respondent further alleges that complainant had, in the year 1864, obtained a patent for the said box containing his bluing, in which it was described as a package or case, which, when made with distributing holes and filled, is cemented by wax or a wafer, which patent was afterwards held to be void.

That the red top was produced by the application of Venetian red, for the purpose of stopping the perforations in the top of the package until required to be opened for use, and that the claim of the red top as a trade-mark was an after-thought of the complainant, suggested as a means of continuing his monopoly after his patent was annulled. That it was not a proper subject of registration as a trade-mark, had never been used or applied as described in the certificate of registration, and was but the ordinary use of a cheap and well known red material as a cement to close the perforations of the box, and when so applied became part of the box itself, and not in any sense a trade-mark.

Respondent further claims that the pictures used by him on the lids of his larger packing boxes were simply pictures free to be used by any one, and alleges that the form of package, labels and other marks claimed by complainant are not original or peculiar, but had been long used by many persons in the same trade.

The respondent admits that he does put up and sell a bluing in boxes having a resemblance in form to those sold by the complainant, but denies that he has done so fraudulently, or that he has ever done so in imitation of the complainant's bluing, or ever done anything not warranted by a fair competition in business, and denies that he has ever offered to sell any of his goods as and for the goods of the complainant, or sold any goods bearing any marks belonging exclusively to complainant, or any false representations thereon calculated to create confusion, and cause his goods to be purchased as and for the goods of the complainant.

He admits that he sells his goods cheaper than the complainant, but alleges that he gives as good an article for less money.

The case now comes on for final hearing, and we have been greatly assisted by the careful and thorough manner in which the facts have been presented, and by the able arguments of counsel, and the very numerous exhibits which have been brought to our attention illustrating and explaining the facts

in this controversy, and also many of the subjects of controversy passed upon in the cases cited in argument.

It appears that the complainant Sawyer in 1863 began using the present form of box as a convenient method of putting up washing blue in a dry powder, and that he began to distinguish them by using a red colored top in 1866.

He used a box, which is a small cylinder of wood, about an inch in diameter, and about two inches high. The box, when filled with the blue powder, is covered by a tin top, with a flange fitting over the top of the box. The tin cover is perforated with five small holes, so that when needed for use the blue powder can be sifted out as from the ordinary pepper, caster or dredging box. Until needed for use the perforations are closed by something in the nature of sealing wax, by pricking which the perforations can be opened.

This device was supposed by the complainant to be patentable, and he did obtain therefor a patent dated January 5, 1864, reissued October 1, 1867, but by a decree of the circuit court for the southern district of New York this patent was held to be void, and that decree, upon appeal to the supreme court, has, since the argument of this case, been affirmed.

The bluing manufactured by the complainant and offered in packages of this form obtained great favor and became well known, and has been the source of large profits. It became well known not only in Massachusetts, where complainant's place of manufacturing is, but in Baltimore, where he has sold large quantities since the year 1871.

Upon the cylindrical box of the complainant he has, since 1866, used a label of dark blue paper, printed in silver letters, which completely envelopes the box, and the metal top is covered entirely by a coating of Venetian red and varnish, so that the box, when standing upright, presents nothing but the blue label and the red top.

The quantity of red cement used is in excess of the quantity necessary to be applied, simply to cover the five small perforations in the metal top, and not only completely covers all the top, but extends nearly a quarter of an inch down the sides of the box, enveloping the whole metal covering.

The box and label and top which the respondent uses is similar in size, shape and appearance, so that, except for the words on the label and the color of the printing, which is in gold bronze instead of silver, and a hardly observable difference in the shade of the red color on the top, there is nothing to distinguish them, and unless the two are side by side and attention has been freshly called to these differences, no one can discriminate between them.

They both present the appearance at a little distance of a blue cylinder, with printing in gilt letters, with a red top of sealing-wax.

The respondent states that he was by trade a stone-cutter, and for a while kept a grocery store, and about 1873 began putting up bluing. That from the first he used the cylindrical box and blue label, but not the red top, and that about 1876, learning that Sawyer's patent had been held void, and supposing it was the red top which had been the subject of the patent, he then began to use the red top.

The labels, when compared, show that they are precisely of the same size and color. Both are divided by vertical lines into four sections of precisely the same sizes, but the words printed on them are different.

On Sawyer's label is printed horizontally:

Sawyer's  
Chrystal  
Blue  
and  
Safety box:

Patent Jan. 5th, 1864;  
re-issued Oct. 1st, 1867.

Then vertically and enclosed by the vertical lines:

The Standard Blue of America. This form is the best and cheapest method of using Bluing. The quality is unexcelled.

Directions:

Pierce the prints on the top with a pin, and sh k a few

grains into a cup of soft water; then stir in the rinsing water.

Prepared by H. Sawyer,  
Boston, Mass.  
H. Sawyer.  
(fac simile of signature.)

On Horn's label is printed, with exactly the same divisions by straight lines, and in almost the same type, horizontally:

Horn's  
unexcelled Sifting box  
Blue.  
Baltimore.  
The Standard Blue of the United States.  
The quality is unequalled.

Directions:

Pierce the holes of the top with a pin, and sift a few grains in a bowl of water, stir until fully dissolved, then add to the rinsing water.

Prepared by  
Jas. G. Horn,  
Baltimore, Md.

No one, we think, having the two labels before him, could believe that the similarities were the result of accidental coincidence. And no one having before him the two boxes, with their similar blue labels and red tops, could fail to be convinced, we think, that there was an intentional similarity in their general appearance, well calculated to deceive persons exercising ordinary caution into mistaking one for the other.

The name and place of manufacture on the labels are different, and many of the words, but the color, size, type, and arrangements and divisions are in such exact similitude in all respects as to divert attention from the differences and to produce the impression that they are the same.

The labels, if pasted upon a flat surface, could with less difficulty be distinguished from each other, but when pasted around a small cylinder, in such a way that only about a fourth

of the surface can be seen at one time, it becomes a matter of painstaking comparison to detect the differences.

The proof and the exhibits also show that these cylindrical boxes are packed by Sawyer by putting four dozen of them into a square, green, paper box just deep enough to contain them when standing upright, and when the lid is taken off nothing is seen of the cylindrical boxes, as they pack very close to each other, but the red tops, and the appearance is that of an almost solid, square mass of red sealing-wax.

And the proof and exhibits show that the respondent packs his cylindrical boxes in precisely the same way, presenting precisely the same appearance. These large boxes of Horn's being of the same color, and having on them labels very similar in designs and color to those of the complainant.

We are satisfied, from an inspection of the exhibits, that the general similarity between the goods of the complainant and respondent in all these respects could not have resulted from accident, but must have been the result of intention, and that the general resemblance is so great as to lead to confusion; and that a purchaser who had been in the habit of getting Sawyer's goods would have to exercise unusual and peculiar care not to take the goods of Horn if they were offered to him.

And, as matter of fact, the depositions of a large number of persons who themselves use the blue for washing purposes in Baltimore were produced, who testified that they knew of Sawyer's blue only by the appearance of the box, and, having been in the habit of using Sawyer's blue, and expecting to get it, had taken Horn's blue when offered them by retail dealers, supposing it was what they had been in the habit of using, knowing it only by the red top and blue box.

Being satisfied that these are the facts as proved by the complainant, we are now to consider the law applicable to them, and what is the remedy, if any, to which the complainant is entitled.

As to the simple question of trade-mark, we think the respondent is sustained in the position taken by him. The red top being, as to its use, a covering for the perforations in the metal top, and as to its color and material one of the

most common of all the cements used to close and seal the mouths of jars, bottles, cans and similar packages, and there being impressed on it no mark or design, it cannot, we think, be said to be a trade-mark, and cannot be exclusively appropriated by the complainant; nor can the form of his box, it having been decided not to be a patentable contrivance, be monopolized by him; nor can the color of the label, nor the allocation of words thereon, nor the type, be exclusively appropriated. The word "chrystal," as applied to bluing, may be his trade-mark if he first so applied it, and the *fac simile* of his autograph signature, but these are all; so that it does not appear, as to anything which the complainant can call technically a trade-mark, that the respondent has been guilty of piracy or imitation.

But we do find that the respondent has been guilty of improper and inequitable conduct, to the injury of the complainant, in having designedly so put up, labeled and packed his goods that purchasers, for whose use they are intended, are misled and deceived, and do get Horn's blue, when they desire and suppose they are getting Sawyer's. And that Sawyer, the complainant, having, after many years of manufacture, established a market and demand for his goods, as known by their peculiar and distinctive appearance, which he was the first to adopt, is now deprived of profits which he would otherwise obtain, by the fact that, after he had so established a reputation and demand for his goods, the defendant, with the intention of getting the benefit of that reputation and demand, has put his goods on the market prepared with such close imitation of the complainant's that they are mistaken for his.

The respondent, while he denied (and there is no evidence whatever to the contrary) that he ever represented or authorized any one to represent that his goods were Sawyer's, does, in his testimony, admit that he put up his goods with the appearance they now have because it was "fashionable," and because he found that a blue box with a red top made them more salable; and as he sells his goods to the grocers at 50 cents for four dozen, while Sawyer has been accustomed to sell his for 85 cents, it is easy to see that the grocers pre-



fer to give their customers Horn's goods, if they will take them, as both retail at about the same price.

It has been said that the fundamental rule applicable to such cases is that one man has no right to put off his goods for sale as the goods of a rival dealer, and that "he cannot, therefore, be allowed to use names, marks, letters or other *indicia* by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person." *Perry v. Truefitt*, 6 Beav. 66-73. And this principle has been recognized as applicable in cases which were not strictly cases of technical trade-marks by many well considered decisions.

In *Williams v. Johnson*, 2 Bosworth, 1, decided in 1857 by Chief Justice Duer and Associate Judges Hoffman and Woodruff, upon appeal to the general term of the supreme court of New York, without deciding whether or not the complainant was entitled to the use of the words "Genuine Yankee Soap," which he claimed as his trade-mark, the court held that the imitations of the size, shape, style, labels and substantial appearance of the complainant's goods by the defendant was a fraud, and that he was entitled to protection, and decreed that the defendant should be enjoined from using the labels, devices and hand-bills which he had been using, and from using any other similar ones, calculated to deceive the public or create the belief that the soap sold by the defendant was the soap made and sold by the complainant.

*Croft v. Day*, decided in 1843, (7 Beav. 84,) was not a case of trade-mark strictly, but of the use by two persons, one named Day and the other named Martin, composing a new firm of Day & Martin, of boxes and labels for putting up blacking similar to those which had been for many years used by an old firm of Day & Martin. In giving the reasons for his decision Lord Langdale, the master of the rolls, said: "The accusation which is made against the defendant is this: that he is selling goods under forms and symbols of such a nature and character as will induce the public to believe that he is selling the goods which are manufactured at the manu-

actory which belonged to the testator in this cause. I stated on a former occasion that in my opinion the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name or to a particular form of words. His right is to be protected against fraud. It is truly said that if any one takes upon himself to study these two labels he will find several marks of distinction. On the other hand the colors are of the same nature, the labels exactly the same size, the letters are arranged precisely in the same mode, and the very same name appears on the face of the jars. It appears to me that there is quite sufficient to mislead the ordinary run of persons, and that the object of the defendant is to persuade the public that this new establishment is in some way or other connected with the old firm, and at the same time to get purchasers to go to 90½ Holburn Hill, and not to 97 High Holburn. I think what has been done is quite calculated to effect that purpose, and the defendant must be restrained.

“My decision does not depend on any peculiar or exclusive right the plaintiffs have to use the names Day & Martin, but upon the fact of the defendant using those names in connection with certain circumstances, and in a manner calculated to mislead the public, and to enable the defendant to obtain, at the expense of Day’s estate, a benefit for himself to which he is not in fair and honest dealing entitled.”

In the case of *Holloway v. Holloway*, (1850,) 13 Beav. 209, the plaintiff having established a reputation for preparations known as Holloway’s pills, and ointment, his brother Henry began to sell H. Holloway’s pills and ointment, put up in similar boxes, and with labels and wrappers similar to plaintiff’s. The master of the rolls said that, although the defendant had a right to constitute himself a vendor of Holloway’s pills and ointment, he had no right to do so in such way as to deceive the public, and make them believe he was selling the plaintiff’s medicines, and that he could not be allowed to perpetrate such a fraud.

In the leading case of *The Leather Cloth Co. v. American*

*Leather Co.* 11 Jur. (N. S.) 513, upon appeal to the house of lords the case was finally disposed of upon the ground that the alleged trade-mark was simply an advertisement of the quality of the goods, and that it was in both cases printed in very large type, in a circle more than six inches in diameter, easily read and hardly to be mistaken one for the other; and Lord Cranworth, in dismissing the case, says: "I mention this because if, instead of occupying this large space, the whole had been engraved on a stamp of the size of a shilling, so as not to be capable of being read without close examination, the case would have been different."

In the case of *Dixon Crucible Co. v. Guggenheim*, decided by Judge Paxson in 1870, (2 Brewster, 321,) although there was no technical trade-mark, to the exclusive right of which the plaintiffs were entitled, the fact that the defendant's packages of stove polish were in size, shape and labels obviously a fraudulent imitation of the complainant's, induced the court to grant relief; although it was shown that the wholesale dealers generally understood the difference, and only the consumers were likely to be deceived.

And in that case, although reference is made to a Pennsylvania statute intending to restrain the counterfeiting of private stamps and labels, the reasons given by the learned judge for his decision are based entirely upon general principles adduced from the authorities cited by him.

The case of *Enoch Morgan's Sons & Co. v. Schwakhoffer*, in the supreme court of the city of New York, was decided upon the same principle. The plaintiffs adopted the name of "Sapolio" as a trade-mark for their goods, and it became known by that name, and by the peculiar and distinctive style of packages, labels and wrappers in which it was put up. The defendant began manufacturing the same kind of goods and adopted the name "Sophia" as his trade-mark, and adopted the same style of package, with labels and wrappers which, through a careful inspection, disclosed were different in almost every particular, and had the defendant's own name on them, yet the court, finding that the defendant's goods were in appearance so close an imitation of the plain-

tiffs' that consumers of ordinary caution did receive one for the other, and finding that the imitation was designed to mislead purchasers, enjoined the defendant.

The case of *Stonebraker v. Stonebraker*, 33 Md. 252, is also a well considered case in which an injunction was affirmed by the court of appeals of Maryland, preventing the use of labels upon medicinal preparations similar to those used by the complainant.

The case of *McLean v. Fleming* (96 U. S. 245, October term, 1877) is a late and authoritative decision by the United States supreme court of questions similar to those arising in the present case, and the principles announced in that decision are, it seems to us, conclusive on the point that the right to a technical trade-mark, in the strict sense of the word, is not necessary to entitle the complainant to relief. For, although the complainants had, in that case, registered their label as a trade-mark, under the act of congress, (which has been declared unconstitutional since the case now under consideration was submitted for decision,) it appears that their so-called trade-mark was in fact, more strictly speaking, only a label.

In *McLean v. Fleming* the complainants for many years had been selling preparations labelled "Dr. C. McLane's Liver Pills," and had put up the pills in wooden boxes of uniform size, shape and appearance, with the name of the original inventor stamped in red wax upon the cover of each box, around which they placed a label or wrapper printed in a distinctive style. About 1855 they adopted a black label with white lettering. The defendant, whose name was J. H. McLean, and who had also for many years been making and vending the same kind of pills in boxes similar to complainants', also adopted a black label with white lettering, very similar to complainants', on which he put the words "Dr. J. H. McLean's Universal Pills or Vegetable Liver Pills." It did not appear that the defendant entered upon the business expecting any advantage from the similarity of names, as the manufacture was begun by both in places far apart, one in Virginia, the other in Kentucky, upwards of twenty years before the filing of the bill.

The supreme court, by Mr. Justice Clifford, delivering its unanimous decision, said: "Positive proof of fraudulent intent is not required when proof of infringement is clear, as the liability of the infringer arises from the fact that he is enabled, through unwarranted use of the trade-mark, to sell a simulated article as and for the one which is genuine. Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed, but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and that he persists in so doing after being requested to desist. Difficulty frequently arises in determining the question of infringement, but it is clear that exact similarity is not required, as that requirement would always enable the wrong-doer to evade responsibility for his wrongful acts. Colorable imitation, which requires careful inspection to distinguish the spurious trade-mark from the genuine, is sufficient to maintain the issue; but courts of equity will not interfere when ordinary attention by the purchaser would enable him at once to discriminate the one from the other. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser, in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right of redress if he has been guilty of no laches. Argument to show that the name of the pills, as given in the trade-mark of the respondent, was of a character to mislead and deceive, is scarcely necessary, as they are *idem sonans* in the usual pronunciation; nor can it be doubted that the form of the box containing the pills, and the general appearance of the wrapper which surrounded it, were calculated to have the same effect. Mention may also be made of the fact that the color of the label and the wax impression on the top of the box are well suited to divert the attention of the unsuspecting buyer from any critical examination of the prepared article. Chancery protects trade-marks upon the ground that a party shall not be permitted

to sell his own goods as the goods of another, and, therefore, he will not be allowed to use the names, marks, letters or other *indicia* of another, by which he may palm off his own goods to purchasers as the manufacture of another. Difference between the exhibits undoubtedly exists, still it is manifest that the general appearance of the package, in the respects mentioned, and others which might be suggested, is well calculated to mislead and deceive the unwary, and all others who purchase the article without opening the box and examining the label."

The decree of the circuit court was affirmed, enjoining the respondent from using his own name upon any label or wrapper for boxes or packages of pills resembling or in imitation of the labels or wrappers or trade-mark of the complainant, whether in style of engraving, printing or lettering, but the decree for account was reversed upon the ground of inexcusable laches and delay in filing the bill.

We have come to the conclusion in the case before us that the respondent should be enjoined from putting up his goods in the manner in which he has been doing, as shown by the exhibits, or in any other manner so simulating the form, color, labels and appearance given by the complainant to his goods as to mislead purchasers into mistaking one for the other.

What we decide is that whether the complainant has a trade-mark or not, as he was the first to put up bluing for sale in the peculiarly shaped and labeled boxes adopted by him, and as his goods have become known to purchasers, and are bought as the goods of the complainant by reason of their peculiar shape, color and label, no person has the right to use the complainant's form of package, color or label, or any imitation thereof, in such manner as to mislead purchasers into buying his goods for those of the complainant, whether they be better or worse in quality. And finding, from the exhibits and proof in the cause, that the bluing put up by the respondent is not only well calculated so to mislead purchasers, but has actually done so, to the injury of the com-

plainant, we are of opinion that respondent should be perpetually enjoined, and that he should account to the complainant for the damages sustained by him.

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**THE EMMA SILVER MINING CO. (Limited) v. THE EMMA  
SILVER MINING CO. OF N. Y. and others.**

(*Circuit Court, S. D. New York. January 14, 1880.*)

PRACTICE—PLEAS—REFERENCE.—Where judgments are pleaded in bar, the court on motion may refer the pleas to a master to ascertain the truth of the same.

*E. W. Stoughton*, for complainant.

*J. E. Burrill*, for defendants.

CHOATE, J. In this case the several defendants have filed, with the leave of the court, several pleas, some of which are to the whole bill and some of which are to parts of the bill. In these pleas they have set forth the existence of certain records, being judgments in suits at law in this court and in courts of Utah. These judgments are pleaded in bar of this suit, or of part or parts of the relief sought by this bill.

The complainant now, without replying or setting down the pleas for argument, moves that it be referred to a master to take proof of the truth of the pleas. The purpose designed to be accomplished by the motion, as stated upon the argument, is that if the pleas, or some of them, are set down for argument the judgments so pleaded may, upon the argument, be before the court. And a further reason alleged for the motion is that, from the peculiar averments in the pleas as to the effect of the former judgments, and the inferences of facts and law drawn from them in the pleas, which may be correct inferences from the records, as recited, but which might not be held to be correct inferences from the records themselves, if exhibited at large, the complainant ought not to be compelled to elect whether to reply to the pleas or to set them down for argument without the production of copies of the records as parts of the pleas.

It is insisted by the defendants that there is neither precedent nor authority for granting this motion, and that the practice established by the equity rules of the supreme court, 33 to 38, is inconsistent with such a practice, and allows only one of three courses for the complainant, either to demur, take issue, or set down for argument.

The ninetieth rule of the supreme court provides that the practice of this court "shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local convenience of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

On the question whether the practice of the English court of chancery sanctions the reference to a master to ascertain the truth of a plea setting up a former judgment or decree in bar of the suit I think there is abundant authority in favor of the practice.

The defendants claim that the practice, if any, is limited to pleas of another suit pending, and perhaps to pleas of another suit pending in the same court. But this is not the result of the cases nor of the discussion of the matter by the commentators. In *Morgan v. Morgan*, before Lord Chancellor Hardwicke, in 1738, 1 Atk. 53, it is reported as laid down by the Lord Chancellor, in that case, as a rule that where a defendant pleads a decree of dismissal of a former cause for the same matters in bar of the plaintiff's demand in his new bill, if the plaintiff does not apply to the court that it may be referred to a master to state whether there is such a decree, but sets down the cause upon the new bill for hearing, it is a waiver of his right of application for such reference, and the court will determine it.

This case shows clearly that the practice of so referring pleas of a former judgment *in bar* was then recognized as proper and as an existing practice. It does not seem to proceed on any mere rule of court, but it establishes or recognizes the rule of practice as being in itself just and right. The reason of the rule is stated by Lord Redesdale as follows:



"There are some pleas which are pleaded with such circumstances that their truth cannot be disputed, *and others being pleas of matter of fact, the truth of which may be immediately ascertained by mere inquiry*, it is usually referred to one of the masters of the court to make the inquiry." Among the pleas so usually referred to he mentions "pleas of a former decree," citing *Morgan v. Morgan*, and "pleas of another suit depending," and says, "they are generally referred to a master, and if the master reports the fact true the bill stands instantly dismissed, unless the court otherwise orders. But the plaintiff may except to the master's report, and bring on the matter to be argued before the court, and if he conceives the plea to be defective in point of form or otherwise, independent of the mere truth of the fact pleaded, he may set down the plea to be argued as in the case of pleas in general."

This statement of the practice is adopted almost without modification by Mr. Justice Story, (Story Eq. Pl. § 700,) and with this agree other learned text writers. The reason for the practice thus given is that the matter of which reference is to be made is one "*the truth of which can be immediately ascertained by mere inquiry.*" That fact generally is the fact of the existence of a certain record. The cases show that in referring the truth of the plea, the questions of the identity of the parties, and the identity of the cause of action, may also be included in the reference to the master. *Tarleton v. Barnes*, 2 Keen, 632-635: *Wild v. Hobson*, 2 Ves. & B. 110.

It is objected by the defendants in this case that to refer to a master the truth of the plea would in effect refer to him the trial of the issue that would be raised by a replication to the plea, and would subject the defendants to great hardship, and indeed not advance the cause. No doubt, in the absence of fixed rules regulating the matter to be referred, the court would, in its discretion, limit the reference as circumstances and the nature of the pleas might require, so that it should be in effect what it is indeed intended to be, only the reference of a matter, "*the truth of which can be immediately ascertained on inquiry.*" The practice being adopted for facilitating and simplifying the disposition of causes, the court will not

allow it to be used to embarrass and protract the litigation, or, under cover of a reference to a master to ascertain facts capable of being ascertained on inquiry, to lead the parties into a long litigation before a master upon a reference which ought to be conducted in the ordinary course of proceeding, upon issue joined, by the taking of proofs before an examiner, to be submitted to the court upon the hearing of the cause.

In the present case an inspection of the pleas shows that, while the existence of records such as are alleged in the pleas may be immediately ascertained on inquiry, the further questions intended to be raised by the pleas, whether they are for the same causes of action, and whether or not the same evidence could have been offered in the two suits, and other matters averred in the pleas, as inferences from the records, are not questions that ought to be referred upon the principle on which such a reference is allowed. But, as the whole purpose of this motion is to set before the court the records, alleged to be set forth according to their tenor in the pleas, that the truth of the existence of records answering the description of those set forth can obviously be immediately ascertained on inquiry, it falls within the principles of the practice established by the English court of chancery to order such a reference.

Independently of this practice of referring the question of the truth of the averment in a plea of the existence of a certain record, it would seem to be entirely competent for the court, upon the suggestion of the plaintiff or of its own motion, to require a defendant, before the plea is argued, to produce a copy of the record relied on by him, of which only a recital, according to the impleader's understanding of it, or his construction of it, is set forth in the plea. Such practice can do the defendants no possible harm, and may greatly facilitate the argument of a cause, and save both parties from useless litigation, and relieve the court from hearing and determining a merely imaginary or fictitious case.

For, making all proper allowance for the plea being entirely honest and truthful, within the apprehension of the pleader, it may well be that inferences partly of fact and partly of law,

drawn from the record as set forth by the pleader in his plea, may be seen by the court to be incorrect and impossible inferences from the record, if actually produced in full. And yet, upon the recital of the record as contained in the plea, the court may be obliged, upon the argument of the plea, to assume the truth of those inferences, because, upon the record as recited, their correctness is not an impossibility. Counsel, in drawing a plea, may properly draw inferences from records which in their judgment have so much plausibility that they may be honestly urged upon the court in argument.

The bringing before the court of the records on which the defendant relies in his plea, therefore, only precludes the defendant from temporarily availing himself of a point which must ultimately be decided against him. The practice of referring the matter to a master does really bring the records themselves before the court, because either party may except to the rulings of the master, and with his report comes up the testimony taken, including, of course, any records put in evidence. And, therefore, the objection urged by the defendants that this reference substitutes the judgment of the master for that of the court, on critical points of the case, has no force.

The pleas in this case are obviously such that they cannot be properly or intelligently argued with any hope of reaching a conclusion that will settle, or aid materially in settling, the real controversy between these parties, without having the records relied upon by the defendants before the court, in place of the recital of those records contained in the pleas. If it be said that it is the right of the defendants to plead what they will, I think it is a sufficient answer that it is competent for the court to require pleadings to be made definite and certain, and so far to control and direct the pleadings that the trial and argument shall be brought down to the real point in controversy. If there is no precedent for an order requiring copies of the records pleaded to be brought in upon the argument of the pleas, there are analogies enough of the similar exercise of power by courts of justice, among which may be mentioned the requiring of the profert of a deed

pleaded, the directing of a bill of particulars, and the practice of requiring pleadings to be made more definite and certain, on motion. The practice of referring the truth of the plea may account for the want of precedents for such an order. It could not be questioned that it would be a reasonable rule of court that in all cases where a record is pleaded it should be set forth in the bill, or the plea *in hæc verba*, or by copy annexed to the bill or plea, unless for cause shown excused by the court; and I think it is equally evident that, where justice and the interest of all the parties require it, or will not be prejudiced by it, and the court may thereby be relieved of hearing and deciding a merely imaginary case, the same thing may be directed by special order. There is nothing in the statutes, or the rules, or the principles of practice to prevent it.

I can see nothing in the rules of the supreme court to interfere with the granting of this motion. It is true that rules 33-38 imply that the plaintiff will demur, reply or set down for argument. This is but the embodiment in rules of the ordinary chancery practice. The reference asked for is merely preliminary to setting down for argument or replying to the pleas. It is not inconsistent with the rules. These rules do not purport to regulate all the points of practice, and they expressly adopt the principles of practice of English chancery not inconsistent with these rules. It cannot be assumed that they were intended to make the practice more difficult and cumbersome, but rather to facilitate and simplify it. Therefore, a practice obtaining in the English chancery not expressly or obviously inconsistent with the rules, and which tends strongly in the direction of abbreviating litigation and relieving the parties and the court from unnecessary proceedings, should be deemed as adopted by the ninetieth rule. This practice is of that nature.

Cases cited in which it appears that the truth of the plea as to the existence of the record has been tried under plea and replication in ordinary course, are of no account, for without question the plaintiff may take that course if he

An order will be entered referring it to a master to ascertain and report as to the truth of the existence of records in any way corresponding with those set forth in the pleas, and directing the master, with his report, to return copies of said alleged records, which shall be produced before him by the defendants, unless, within ten days after entry and notice of this order, the defendants shall file with their pleas, and to be taken as parts thereof, copies of the records set forth or intended to be set forth therein. And, if such copies are filed, then this motion to be denied; and the plaintiff is to have till the next rule day, after the coming of the master's report or notice of such filing, to demur, reply to, or set down for argument the said pleas.

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THE ST. LOUIS NAT. BK. v. BRINKMAN.

(Circuit Court, D. Kansas. January 7, 1880.)

NATIONAL BANKS—JURISDICTION.—National banks are not authorized to institute suits in the federal courts out of the districts where they are established, when the amount in controversy does not exceed \$500.

*Sterry & Sedgwick*, for plaintiff.

*Gardiner Lathrop*, for defendant.

FOSTER, J. The plaintiff is a national bank, duly organized under the act of congress of June 3, 1864, (13 U. S. St. 99,) and is established and doing business at the city of St. Louis, state of Missouri. It brings this action against the defendant, who is a citizen of the state of Kansas, to recover the sum of \$138.51, with interest from August 10, 1878, at 10 per cent. per annum, for so much money collected by defendant for the use and benefit of plaintiff.

The defendant maintains that the plaintiff, being a national bank established out of this judicial district, this court has no jurisdiction.

The question is one upon which I have found no adjudicated case, and we have to look to the several acts of congress to determine the point at issue.

Involving, as it does, the right of national banks to sue in the federal courts out of the district in which they are established, the question presented is an interesting one. The amount in controversy in this case being less than \$500, that alone would defeat the jurisdiction, unless there is some law authorizing national banks to sue in the federal courts out of the district where they are established, and without regard to the sum in controversy.

Section 59 of the act of 1863, commonly known as the "Currency Act," (12 U. S. St. 681,) reads as follows:

"That suits, actions and proceedings, by and against any association under this act, may be had in any circuit, district or territorial court of the United States, *held within the district in which such association may be established.*"

The act of June 3, 1864, (13 U. S. St. 116, § 57,) reenacts this section, omitting the words "by and," so it in terms only authorized proceedings in said courts against such associations and not by them. But the supreme court, in *Kennedy v. Gibson*, 8 Wall. 506, held that the omission of those words was accidental and not intentional, so the law remained in that respect as it was originally enacted. When the revision of the United States Statutes was had, this section was dropped from the currency act, title, "National Banks," and was placed under the title "Judiciary," and there reads as follows:

"The circuit courts shall have original jurisdiction as follows:

\* \* \* \* \*

"*Tenth.* Of all suits by or against any banking association, *established in the district for which the court is held*, under any law providing for national banking associations." U. S. Rev. St. 110, 111.

It will be seen that this provision is in substance the same as that contained in the currency acts before mentioned, and very clearly limits the jurisdiction to suits by or against *banking associations established in the district where the court is held*, and that jurisdiction in no way depends upon the amount in controversy.

There is but one other provision of the law touching this question, and that is found in the Rev. St. (2d Ed.) 993, under the title "National Banks," and among the enumerated powers conferred on these banks is the following: "To sue and be sued, complain and defend, in *any* court of law and equity *as fully as natural persons*." This provision is copied *verbatim* from the currency acts of 1863 and 1864.

There is nothing in this enactment conferring any special jurisdiction on the federal courts in cases where national banks are parties; but these banks are placed on an equal footing with natural persons in all courts of law and equity.

Now in the case of natural persons the citizenship of the parties and the amount in controversy in actions of this nature are both material, and are the controlling elements to jurisdiction in this court.

I need not decide or discuss the question whether a national bank organized under the law of congress and established in the state of Missouri is a citizen of that state under the rule recognizing corporations organized under the laws of a state as citizens of that state, for the purpose of suing and being sued in the federal courts. Even if the affirmative of that proposition could be maintained, there would still be a want of jurisdiction in this case, as the amount in controversy is not sufficient, and on that ground this case must be dismissed, and the costs paid by defendant refunded to him.

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HEWAT v. HAVEMYER.

(District Court, E. D. New York. ———, 1880.)

**DAMAGES TO CARGO—DRAINAGE OF SUGAR—FREIGHT.**—Where a cargo of sugar was brought from Havana to New York in bags, and the consignees refused to pay the freight, alleging damage to the sugar by reason of bad storage, and careless delivery, to the amount of \$1,100, whereupon the master brought suit to recover his freight, *held*, that upon the evidence the ship was not liable for any damage to the sugar which arose from unusual drainage, and not by fault of the ship, and therefore the master is entitled to his freight.

*Butler, Stillman & Hubbard, for Hewat.*

*Man & Parsons, for Havemyer.*

BENEDICT, J. The weight of evidence is that the damage to the sugar in question arose from drainage of the sugar itself, for which the ship is not liable. But if the opinion of the claimant's witnesses, that the appearance of the sugar in the stained bags is indisputable evidence of contact with water, be taken to be correct, then the positive evidence in regard to the storage of the sugar, the dry condition of the ship, and the place where the stained bags were found, as to all which there is no dispute, warrants the inference that any contact with water, if it occurred, must have taken place before the bags were shipped, and was not disclosed on their outward appearance when shipped, in which case, also, the ship would not be liable.

There is a small charge of \$5.75 for sugar lost that is covered by the allegations in the answer, but I think the testimony that all the sugar received was delivered is an answer to this demand, in the absence of any evidence that any was lost overboard during the delivery.

The claim of a damage of four cents a pound on the "sweepings" can hardly be held to be covered by the pleadings, but if it were, the proofs do not sustain it. The evidence is that the bags were handled with ordinary care, and in the method then usually pursued, and that the proportion of sweepings, though large, was not excessive. Whatever excess of sweepings there was, is fairly attributable to the condition of the bags and the description of sugar they contained, and is not chargeable to the ship. It is no part of the carrier's contract that sugar, which in handling necessarily runs out because the bags are not strong enough to endure ordinary handling, and must therefore be swept up from the hold, shall be delivered clean.

The libellants are entitled to a decree for the balance of freight unpaid, with interest and costs.



## THE UNITED STATES OF AMERICA v. GOGGIN.

*(Circuit Court, E. D. Wisconsin. January 5, 1880.)*

INDICTMENT—FRAUD, HOW ALLEGED.—An indictment charging fraud should aver the fraud with sufficient particularity to enable the defendant to prepare his defence, and plead the judgment as a bar to a subsequent prosecution.

*G. W. Hazelton, U. S. Dist. Att'y, for the United States.*

*Jenkins, Elliott & Winkler, for defendant.*

DYER, J. This is an indictment for presenting for payment to the pension agent in Milwaukee a false and fraudulent claim for pension moneys. The defendant was tried and convicted at the last term of the court, and the case is again up for consideration upon a motion in arrest of judgment.

It is not without reluctance that I have come to the conclusion with reference to the disposition of the motion which I am constrained to announce, since the evidence adduced on the trial tended strongly to show the perpetration of a gross fraud upon the government; but it is the duty of the court to administer the law according to its best understanding, regardless of consequences.

The defendant was indicted under section 5438, Revised Statutes, which provides that every person who presents for payment to or by any person or officer in the civil service of the United States any claim upon or against the government, or any department thereof, knowing such claim to be false, fictitious or fraudulent, shall be punished as the statute directs. The offence may in one view be regarded as a felony, and in another view as a misdemeanor, since the statute declares with reference to the punishment that the person offending shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than \$1,000 nor more than \$5,000.

The indictment contains three counts, but as they are equivalent in form reference to one will be sufficient. The first count charges that on the fourth day of December, 1877, the defendant did present and cause to be presented for pay-

ment to and by a person in the civil service of the United States, to-wit, Edward Ferguson, a pension agent of the United States, at the city of Milwaukee, a claim against the government of the United States, to-wit, a claim for the sum of \$24, then and there claimed and represented by the defendant to be due to him from the said government of the United States as a pensioner, *under and by virtue of a certain instrument known as a pension certificate*, which said pension certificate had been theretofore procured and obtained by the said Richard Goggin upon false and fraudulent proofs, and without the authority of law, and in fraud of the law governing pensions and pension certificates; he, the said Richard Goggin, well knowing, at the time and place of making said claim, and of presenting the same for payment, that it was then and there false, fictitious and fraudulent. Objection is made to the indictment as not stating any offence, the argument being that no offence is described with such certainty as the law of criminal pleading requires. The reply of the learned district attorney is that it states the offence substantially in the language of the statute, and that this is sufficient. It will be observed that the gist of the offence, as we find it defined in the statutes, is the presentation for payment of a *false and fraudulent claim*.

The indictment alleges no facts which constitute the fraud; it is not shown how the fraud was perpetrated, nor wherein the claim was false, except that the defendant presented a claim which he represented to be due to him by virtue of a pension certificate, which had been theretofore procured upon false and fraudulent proofs, and by unlawful and fraudulent devices, and without authority of law. What the false and fraudulent proofs, and unlawful and fraudulent devices were, is not stated. The question is, are these allegations sufficiently certain, and do they contain statements of fact which will support a conviction? My impression, upon the argument, was that the objection urged by counsel for defendant was one which went rather to the form than to the substance of the indictment, and that, as he had not moved to quash, his objection was not good in arrest of judgment; but the rule

is that any objection to an indictment which would be good upon demurrer, is fatal on motion in arrest, and this being so, the objection to the indictment, if well grounded in law, may be as well taken at the present stage of the proceedings as by motion to quash. In the case of the *U. S. v. Watkins*, 3 Cranch, Cir. Ct. Rep. 441, the court had occasion to state the rule with reference to certainty in alleging frauds in a case of false pretences, and it was there held that an indictment charging fraud should aver the means by which the fraud was effected; that fraud is an inference of law from certain facts, and the indictment must aver all the facts which constituted the fraud; that whether an act has been fraudulently done is a question of law, so far as the moral character of the act is involved. To aver that an act was fraudulently done is, therefore, to aver a matter of law and not a matter of fact. (See pages 456, 457, 458 and 459.) It is true that this was a case of false pretences, and there may be a well grounded distinction, as argued by the learned counsel for the United States, between such a case and the case in hand; because, in a case of false pretences, it is undoubtedly essential that the facts and circumstances should be alleged with such certainty that the court may see upon the face of the pleading that the pretences were false, and that they were of such character, and were made under such circumstances, as constitute false pretences within the meaning of the criminal law; that they were relied upon, acted upon, and that the party defrauded had a right to rely upon them; and herein, and perhaps in some other respects, such a case is distinguishable from the precise question which we have in the case at bar. But it is undoubtedly a sound principle that an indictment charging fraud of any sort ought to aver, with requisite particularity, wherein the fraud consisted, and the means by which it was effected, and I have been unable to find any case which dispenses with the application of this rule. It is true that many of the niceties and technicalities with reference to form in criminal pleading which once existed are not allowed now to prevail, but I do not understand that there has been any relaxation of the rule with reference to certainty and clear-

ness as to the matter charged. It is also a general rule that in an indictment for an offence created by statute it is sufficient to describe the offence in the words of the statute.

In the case of the *U. S. v. Simmons*, 96 U. S. 360, the supreme court had occasion to point out the precise scope and limitations of this rule, and after stating the rule Justice Harlan says, in the opinion: "But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence." And here, I think, we strike the fatal point in this indictment; for, after as careful and serious consideration as a case of this nature requires, I am unable to see how defendant could plead his present conviction under this indictment, and a judgment thereon, in bar of a second prosecution for the same offence. It is alleged, only, that he presented to the pension agent a claim for pension moneys under a pension certificate which was procured by false and fraudulent proofs, and unlawful and fraudulent devices. The fraud should have been, by apt allegation, more particularly identified; it should have been alleged what the proofs and devices were, and wherein they were fraudulent; and it is, in my judgment, immaterial when the proofs were made, or devices resorted to—whether at the time of presenting the claim, or at a time anterior—and when made, as the basis for obtaining the pension certificate. If the fraudulent devices had consisted of an act done when payment was demanded, it would, I think, be clear that the nature of the devices, or particular fraud practiced at the time, should be alleged, and, if this is so, it seems also essential that they should be alleged, though they were, in fact, practiced at and before the time of obtaining the pension certificate. The offence, it is true, was one committed, not in 1867, but in 1877 and in 1878—that is, a claim was presented for payment at those times—but, going back to the origin of the alleged fraud, I do not understand why it is not

as necessary to allege wherein the fraud consisted at its inception, and when made the basis for obtaining the pension certificate, as it would be, if it consisted of some device practiced at the very time the claim was presented for payment. It was necessary to show the alleged fraud and the acts which constituted it, on the trial, and it was, therefore, necessary that it should be alleged, at least with sufficient particularity to enable the defendant to plead any judgment which might follow, as a bar to a subsequent prosecution for the same offence. The allegation is that a claim was presented by the defendant, as a pensioner, *under and by virtue of a certain instrument known as a pension certificate*; but this certificate is not described so that it can be identified; and I think it should have been so described as to make it capable of identification—as by date, the names of the persons who purported to sign it, and the like—so as to satisfy the requirements of the rule as laid down by the supreme court in *U. S. v. Simmons*. If we adopt as authoritative, upon the question under consideration, the case of the *U. S. v. Bettilune*, 15 Inter. Rev. Rec. 32, which is a case somewhat in opposition to *U. S. v. Ballard*, 13 Inter. Rev. Rec. 195, it is very clear that we should have to hold this indictment insufficient; and I incline to the opinion that the correct rule is stated in the former case.

It was stated upon the argument that what is alleged in the indictment in regard to fraud in obtaining the pension certificate relates to the *evidence* of the offence, and not the offence itself; but it is not the presentation of the claim for payment which makes the offence, it is the presentation for payment of a *false or fraudulent claim*, and as no fraud can be committed but by deceitful practices, the particular deceitful practices by which the fraud is alleged to have been committed, or which make the claim fraudulent, should be to such extent set forth as to make the fraud appear upon the face of the indictment. This may be, to a certain extent, alleging the evidence of the offence, but it is rather the statement of essential facts which constitute the fraud, and therefore make the presentation for payment of the claim a criminal offence.

The point is one that cannot be made clearer by elaboration. I rest my judgment upon the fact that the allegations of the pleading are not sufficient, within the rule stated by the supreme court, to apprise the defendant with that certainty which the law requires of the nature of the accusation against him, to the end that he may prepare his defence, and *plead the judgment as a bar to any subsequent prosecution for the same offence.*

Judgment must be arrested.

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## THE SVEND.

RICHARDS and others v. HANSEN.

(Circuit Court, D. Massachusetts. November 24, 1879.)

COMMON CARRIERS BY WATER.—EXCEPTIONS IN BILL OF LADING.—Exceptions in a bill of lading against breakage, leakage and rust, as well as the perils of the sea, do not relieve a carrier from liability where a cargo of iron was injured by salt water, owing to improper stowage and the defective construction of the vessel.

CLIFFORD, J. Carriers of goods, if common carriers, contract for the safe custody, due transport and right delivery of the same, and, in the absence of any legislative regulation prescribing a different rule, are insurers of the goods, and are liable at all events and for every loss or damage, unless it happened by the act of God, or the public enemy, or the fault of the shipper, or by some other cause or accident expressly excepted in the bill of lading, and without any fault or negligence on the part of the carrier. *The Cordes*, 21 How. 23. Ship-owners and masters of ships employed as general ships in the coasting or foreign trade, or in general freighting business, are deemed common carriers by water, and as such are as much insurers of the goods they transport as common carriers by land, unless it is otherwise provided in the bill of lading. Story on Bailments, (7th Ed.) 501. Such a carrier's first duty, and one implied by law, is to provide a seaworthy vessel, tight and staunch, and well

furnished with suitable tackle, sails or other motive power, as the case may be, and furniture necessary for the voyage. Vessels so employed must also be provided with a crew adequate in number, and sufficient and competent to perform the required duty, and with a competent and skilful master of sound judgment and discretion. Owners in such cases must see to it that the master is well qualified for his situation, as they are directly responsible for his negligences and unskilfulness in the performance of his duty. In the absence of any special agreement to the contrary, the duty of the master extends to all that relates to the lading and stowage of the cargo, as well as to the transportation and delivery of the goods, and for the performance of all those duties the ship is liable, as well as the master and owners. *Elliott v. Russell*, 10 John. 7; *King v. Shepherd*, 3 Story, C. C. 349; *Abbott on Ship*. (8th Ed.) 478. Goods of great value, consisting of sheet iron in bundles, were shipped by the libellants in the steamer *Svend*, bound on a voyage from the port of Liverpool to the port of Boston. By the manifest it appears that the steamer was an iron propeller, carrying general cargo for freight, and that the shipments belonged to various persons, which, of itself, is sufficient to show that the master and owners were common carriers in the strictest sense. Sufficient also appears to show that the goods, when shipped, were in good order and condition, and that the covenant of the bill of lading is that they shall be delivered in like good order and condition. One thousand bundles of the shipment, stowed in the forward part of the aft lower hold, were badly wet with salt water to such an extent that, when the bundles were hoisted out to be delivered, the water dripped out of the same and appeared muddy with rust. Damages are claimed by the libellants, in the libel as amended, for breach of the contract to deliver the goods in the condition specified in the bill of lading in the sum of four thousand dollars, and the evidence shows that the goods shipped were injured in the manner charged to an amount even greater than that alleged in the libel. Compensation for the injury is claimed by the libellants upon the following grounds:

*First.* Because the evidence proves to a demonstration that the goods were shipped in good order and condition, and that the respondents have failed to show that the injuries to the goods resulted from the excepted perils, or any of them, or from the fault of the shipper.

*Second.* Because the steamer was unseaworthy in that she was not of a construction suitable to carry such a cargo on such a voyage at that season of the year.

*Third.* Because the ceiling of the steamer was not of a suitable character, nor fit to protect such cargo from salt water on the described voyage.

*Fourth.* That the goods injured were not properly stowed or dunnaged for their protection against injuries of the kind on such a voyage.

Two points are not controverted in argument by the respondents:

*First.* That the goods were in good order and condition when shipped.

*Second.* That the quantity mentioned in the libel was injured in the course of the voyage, and that it was not in good order and condition when delivered.

Conceded or not, the evidence to that effect is satisfactory and conclusive, but the respondents explicitly deny every other proposition submitted by the libellants, and insist as follows:

*First.* That the burden of proof is upon the libellants to prove that the injury to the goods did not result from the excepted perils.

*Second.* That the steamer was in all respects seaworthy, and of suitable construction and equipment to transport such a cargo on such a voyage at that season of the year.

*Third.* That the ceiling of the ship was sufficient, and that the goods were properly stowed and dunnaged.

Hearing was had in the district court, and the district court entered a decree dismissing the libel, from which decree the libellants appealed to this court. Since the appeal was entered here more than sixty witnesses have been examined by the parties, which renders it necessary to review all the



findings of the court below, as well as the legal principles applied in disposing of the case.

Due shipment of the goods is not denied, nor is it controverted that the steamer sailed from Liverpool, March 24, 1873, and that she arrived at Boston, her port of destination, April 14, in the same year. Certain exceptions are contained in the bill of lading. At the time of the voyage the steamer was comparatively a new vessel, it appearing that she was built in October of the previous year. Competent expert witnesses in great numbers describe the construction of the steamer under deck as low-waisted forward of the poop, and express the opinion that she was unfit to make such a voyage during the winter months. They were asked to give the reasons for that conclusion, and answered to the effect that in such a construction as that described the tendency in rough weather would be to fill the waist with water, and to cause the vessel to strain and roll deep and heavy. When asked what effect the straining of the vessel would have upon her ceiling in the lower hold, the answer was that if the vessel labored heavily it would cause her to blow; that the deeper the ship rolls the higher she will blow the water in her bilge, particularly if her ceiling is not water-tight. Sheet iron, all agere, is quite susceptible to damage from being wet, and some of the expert witnesses testify that a drop of sea water will damage a sheet of the iron, and that it would take very little water to go through a whole package of such merchandise. Apart from the construction of the steamer, including her ceiling, no attempt is made to show that she was unseaworthy. Beyond doubt, she was comparatively new, and was staunch and strong. Nor is it pretended that the damage to the cargo resulted from any defects in the hull of the vessel or in her equipment, beyond what is embraced in the charge that her construction in the particulars mentioned exposed the vessel to unusual strain in bad weather, and tended to make her roll unusually deep and heavy.

Argument to show that the vessel, when she rolls deep and heavy, is more likely to blow and expose cargo stowed in her aft lower hold to wet, is quite unnecessary, as the conclu-

sion accords with all experience, and is fully established in this case by the evidence, unless the ceiling of the ship is water-tight. Owners of vessels of such a construction, even though they are seaworthy in the general sense, are bound to furnish such appliances for the protection of the cargo so stowed as will protect it from injury arising from the ordinary perils of navigation. Damage to cargo, occasioned by salt water, does not come within the excepted perils when, by reason of the place in which it is stowed, it is exceptionally liable to such injury in severe weather. *The Oguendo*, 38 Law Times, (N. S.) 151. Ship-owners, by such a bill of lading, contract for safe custody, due transport, and right delivery of the goods, in like good order and condition as when they were shipped; and it is universally admitted that the contract implies that the ship is reasonably fit and suitable for the service which the owner engages to perform; that she is, and shall continue to be, in a condition to encounter whatever perils of the sea a ship of the kind, laden in that way, may be fairly expected to encounter in the contemplated voyage. Safe custody is a part of the contract, and if, in consequence of the peculiar construction of the ship, further appliances are necessary to protect the cargo from injury by ordinary perils, not excepted in the bill of lading, the duty of the owner is to furnish all such; and if he fails to do so he is responsible for the consequences. *The Marathon*, 40 Law Times, (N. S.) 163. Explicit exceptions may excuse imperfections of construction or repairs, but, in the absence of express words to the contrary, a bill of lading, in the usual form, implies a warranty of seaworthiness when the voyage begins, and all the exceptions in it must, unless otherwise expressed, be taken to refer to a period subsequent to the sailing of the ship with the cargo on board. As for example: Wheat was shipped at New York for Scotland, under a bill of lading excepting perils of the seas, however caused. During the voyage the wheat was damaged by sea water. In an action by the holders of the bill of lading against the owners of the ship, the jury having found that the water obtained access to the cargo in consequence of one of the ports being insuffi-

ciently fastened, the subordinate court entered a verdict for the ship-owners, upon the ground that the loss was covered by the exception in the bill of lading. But the House of Lords, on appeal, reversed the judgment, and held that as in order to bring the loss within the exceptions it must be found that the ship sailed with the port in a seaworthy state, a new trial must be had, it not appearing that that fact had been found by the jury. *Steel v. State Line Steamship Co.* 37 Law Times, (N. S.) 333; *Lyon v. Mells*, 5 East. 428.

Two defects are suggested in the steamer, both of which, if they be defects, existed at the time the ship sailed:

*First.* That the construction of the ship, as already explained, rendered her unfit to transport such a cargo on such a voyage at that season of the year.

*Second.* That the ceiling of the ship, in view of her peculiar construction, was not sufficient to protect such cargo from damage by salt water in such a voyage during the winter months of the year, when rough weather may reasonably be expected.

Rough weather, as all experience shows, may be expected on such a voyage in the winter and early spring months of the year, but the respondents deny that the construction of the steamer rendered her unfit to transport such goods on such a voyage, and insist that her ceiling was properly constructed and sufficient to protect such cargo, in the place where it was stowed, from damage by salt water, and from every peril within the contract of the bill of lading. When built the steamer was ceiled with a permanent ceiling up to her deck. It is claimed by the respondents that she had during the voyage, in addition to that, a temporary ceiling up to the turn of the bilge, but the evidence, taken as a whole, does not sustain that theory of fact. Even the master testifies that "she was ceiled all the way up to the deck," but he says nothing about any such additional temporary ceiling as that supposed by the respondents. Surveyors examined the steamer in New York, and one of them speaks of the vessel as ceiled to the deck, but makes no mention of any temporary ceiling of any kind. Proof that the steamer had no

such ceiling is also derived from the statements of the consignee, who testifies that he went down into her hold after she was discharged, and he states that she was ceiled from the keelson entirely up to the deck. Nor does he say a word about any additional ceiling. Ships carrying grain frequently have what is called a grain ceiling, in addition to the ordinary permanent ceiling, which usually extends only to the upper turn of the bilge. Unlike that, a grain ceiling is a temporary appliance built up as dunnage to keep the grain removed from the permanent ceiling. Support to the theory of the respondents that the steamer had such temporary ceiling for the protection of the cargo in question is derived chiefly from the testimony of the head stevedore, who superintended the discharge of the cargo, and the fact that the steamer, on her former voyage from Odessa to Falmouth, for orders, carried a cargo of wheat, which was delivered without injury.

Beyond all doubt, the evidence shows that the damage was caused by salt water, which came in contact with the bundles of sheet iron as they lay stowed in the aft lower hold; and it is equally clear that the water must have reached the iron in large quantities to have caused such extensive damage to one thousand bundles of the iron, estimated to weigh 55 tons. Cargo stowed in the same hold, above the bundles of sheet iron, came out in good condition; and the witnesses for the respondents agree that there had been no leakage through the hatches, from which it would seem to follow that the water must have come from below.

Confirmation of that view, of a persuasive character, is derived from the testimony of the master, who in direct terms attributes the damage to the blowing of bilge-water through the seams of the ceiling in the after hold when the steamer rolled. Cogent support to that theory is also derived from the testimony of the mate, who expresses the opinion that it was caused by the ship laboring so heavily and rolling. Convincing confirmation of that theory, if more be needed, is also found in the testimony of Port Warden Paine, who testified that when he went down into the after hold he did not see

anything that denoted a leak, and he expressed the opinion that it must have been done by what is called blowing—that is, that the bilge-water swashes up when the ship rolls; and he added that it is a common thing for bilge-water to blow up when the ship labors, as explained, and that it does not take much water to damage sheet iron. Few steamers have their ceiling caulked so as to be water-tight, and in all cases where they do not it seems that the blowing of bilge-water through the seams of the ceiling is a common occurrence when the vessel rolls. Steamers, as well as sail ships, roll more or less on every such voyage, varying in degree with the state of the wind, the construction of the vessel, the manner in which she is loaded, and the means by which she is propelled. Even suppose that cases may arise where it would properly be held that blowing is a peril of navigation, within such an exception in a bill of lading, it is clear such a rule cannot be applied in this case, as it appears that the goods might have been protected from such damage by a reasonable foresight, care and prudence, the rule being that the carrier ought to take adequate measures to protect the cargo against a common and ordinary occurrence which might and ought to have been foreseen. *Bearse v. Ropes*, 1 Sprague, 332.

Dangers of the seas, said Judge Story, whether understood in its most limited sense as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense as including inevitable accidents upon that element, must still in either case be clearly understood to include only such losses as are of an extraordinary nature, or arise from some irresistible force or some overwhelming power which cannot be guarded against by the ordinary exertions of human skill and prudence. *The Reeside*, 2 Sum. 571. Hence it is that, if the loss occurs by a peril of the sea that might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be in the sense of the phrase such a loss by the perils of the sea as will exempt the carrier from liability. Story on Bailments, (7th Ed.) § 512a; *Nugent v. Smith*, Law Rep. 1 C. P. D. 437; 3 Kent's Com. (12th Ed.)

217. Both parties agree that the steamer was well built, and that in the general sense she was seaworthy when the voyage began and when it ended at the port of destination, the only defect alleged by the libellants being that in consequence of her peculiar construction and the insufficiency of her ceiling and dunnage, she was unfit to carry sheet iron stowed in her aft lower hold on such a voyage during the winter and early spring months of the year; and the court is of the opinion that the great weight of the evidence fully sustains that proposition. It may be that the steamer would have been a fit and proper vessel to carry such cargo on such a voyage in a milder season of the year, or that she would have been a fit and proper vessel for the voyage in question if her ceiling had been water-tight, or if the sheet iron had been stowed between decks; but it is very clear, in the judgment of the court, that the construction and defective ceiling of the steamer, taken in connection with the place and manner of stowage, rendered her unfit to transport such goods on such a voyage at that season of the year. By the terms of the bill of lading safe custody is as much a part of the contract of the carrier as due transport and right delivery. When shipped the sheet iron was in good order and condition, and when delivered it was badly damaged by salt water, the evidence showing to the satisfaction of the court that the water obtained access to the goods through the seams or crevices in the ceiling of the steamer.

Evidence of leakage is not exhibited in the record, and inasmuch as it is proved that the cargo stowed above the iron in the same hold came out dry, it seems clear, almost to a demonstration, that if the ceiling had been water-tight no such damage would have been occasioned, and that the swashing of the bilge-water between the sides of the vessel and the ceiling would not have caused it to reach the sheet iron, though stowed in the aft lower hold. Where goods are shipped and the usual bill of lading given, promising to deliver the same in good order, the dangers of the seas excepted, without more, and they are found to be damaged, the *onus probandi* is upon the owners of the vessel to show that the injury was

occasioned by one of the excepted perils. *Clark v. Barnwell*, 12 How. 272; Story on Bailments, (7th Ed.) § 529; *Nelson v. Woodruff*, 1 Black, 156. Reported cases, however, may be found where it is held that if an excepted peril is shown which is adequate to have occasioned the loss, the burden of proof shifts, and that the shipper, in such a case, is required to show that it was not occasioned by that peril, but by some negligence of the carrier, which rendered that peril efficient, or co-operated with it, or brought it about without any connection with the sea peril. *The Invincible*, 1 Lowell, 226; *The Lexington*, 6 How. 384. Such ship-owners, carrying goods under a bill of lading by which they contract to deliver the goods in good order and condition, certain perils excepted, are bound to deliver the same in that condition unless prevented by those perils, and are responsible for any damage to the goods occasioned otherwise than by those perils. *The Chasca*, 32 Law Times, (N. S.) 838. Three marine surveyors examined the steamer after her return, and concur in the opinion that she was not fit for such a voyage, at that season, in view of her construction and consequent tendency to roll and produce blowing in a heavy sea, and many other witnesses are of the same opinion. Her internal construction was such that bilge-water could blow into the hold through the seams of her ceiling when she rolled, it appearing that her ceiling was built upon the ribs of the ship, beginning at the keelson, only 14 inches above her iron bottom, and that it continued all the way up to her main deck, being only about four inches away from her iron sides, which shows that bilge-water might rush up between the ceiling and her iron sides whenever the ship rolled, as there is no evidence to show that the seams of the ceiling were caulked or pitched before she sailed, or at any time during the voyage. Defects of the kind might easily have been remedied before the voyage began, or at any time during its progress; but it does not appear that any attempt was made to apply any of the known remedies for such defects. Stowage in the lower hold may be a fit place even for such a cargo in a steamer of a different construction, and doubtless might have been in the steamer

of the libellants if the ceiling had been water-tight, or if proper means had been devised and applied to prevent the bilge-water, when the vessel rolled, from blowing or escaping through the seams of the ceiling, and finding access to the sheet iron as stowed in the hold. Suitable appliances, it is not doubted, would have prevented such consequences, and protected the cargo from damage. Nothing of the kind was done or attempted, and, in view of the exposed condition of the cargo from the causes shown, the conclusion must be that the place where the same was stowed was an unfit place, in that steamer, for stowing such cargo on such a voyage at that season of the year.

Defences of various kinds are set up in argument, of which the two principal ones deserve to be specially examined:

*First.* That the bill of lading excepts leakage, breakage and rust; the language of the instrument being "not answerable for leakage, breakage or rust."

*Second.* That the damage was caused by the perils of the seas, within the meaning of the bill of lading.

1. Two or more answers may be made to the defence, arising from the said exception:

*First.* It is not adequate to have occasioned the loss. Rust may be caused by sweat or mere moisture of the air in the place where goods are stowed, and it may be that the exception is adequate to cover such a loss, and in such a case to shift the burden of proof from the carrier to the shipper, to show that the loss was not occasioned by that peril.

*Seco d.* Concede that, but it by no means follows that such an exception is adequate to cover the damage in this case, which arose from the profusely wetting and soaking the sheet iron in salt bilge-water, blown through the seams and crevices of the ceiling on the sides of the place where the iron was stowed. Viewed in the light of the actual circumstances, it is clear that the exception is neither adequate nor sufficiently comprehensive to cover the damages occasioned by the means proved in this case.

*Third.* Suppose, however, it may have the effect to shift the burden of proof, still it does not follow that the defence



is a valid one, as it fully appears that the evidence introduced by the libellants is sufficient to overcome every presumption in favor of the carrier, and to show that the damage was occasioned by mere want of foresight, care and diligence.

2. Nor is there any better ground to support the second defence. Evidence to support the defence was introduced in the court below, consisting of the depositions of the master, mate and engineer of the steamer, and the protest filed in the case; and those documents are exhibited in the record, together with the depositions of nineteen other witnesses taken since the appeal, of which sixteen were introduced by the libellants. Ships carrying cargoes as common carriers must be fitted to encounter ordinary sea perils on the voyage described in the contract of shipment. Injuries to cargo resulting from such perils give the shipper a right of action against the carrier, but the court below, on the evidence then exhibited, found that the gales were proved to be of extraordinary violence, and such as would have been likely to damage a seaworthy ship, and to come within the usual definition of such perils. Responsive to that, the first observation to be made is, that the gales referred to did not damage the steamer of the respondents in the slightest degree worth mentioning, as appears from all the testimony exhibited as to her condition after she arrived at her port of destination. Except that the muzzle around the end of the pipe under the ceiling broke loose, there is no proof of actual damage to the steamer, and it is not claimed that the expenses of repairing that injury would amount to more than a nominal sum. Witnesses called by the respondents, especially the officers of the steamer, sustain the theory of the respondents that the gales which the steamer encountered were extraordinary, but in view of the very slight damage to the vessel, and the contradictory testimony introduced by the libellants since the appeal, the court is of the opinion that the violence of the gales was much exaggerated in the testimony of the officers as introduced in the court below. *The Oguendo*, 38 Law Times, (N. S.) 151. Opposed to the theory of the respondents that  
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the damage was occasioned by the extraordinary perils of the seas, is the united testimony of the sixteen witnesses since introduced by the respondents. Suffice it to say, without reproducing their testimony, that they are witnesses of great nautical experience, and that they all testify in substance and effect that the weather, even as described by the master, was not more boisterous than is usually found on that voyage at that season of the year. Eight steamers coming westward over the same route as the steamer of the respondents, starting at different times later, overtook and passed her at various points on her course, and encountered only moderate weather, and made very good passages as to time. On the other hand, steamers which left a week earlier than the steamer of the respondents encountered severe and heavy weather, such as is to be expected and is usually experienced during the winter and early spring months. Inquiry was made of the master whether or not there was any unusual wind or weather during the voyage, and his answer was, "We had very heavy gales, sir, but I could not say it was an unusual thing to have, except at that season, being so far advanced."

Examined in the light of the whole evidence, the court is of the opinion that the respondents have failed to show that the damage was occasioned by the perils of the seas within the meaning of the bill of lading. Much testimony was introduced by the respective parties in regard to the dunnage of the sheet iron stowed in the lower hold. Dunnage usually consists of pieces of wood placed against the sides and bottom of the hold of the ship, to protect the cargo from injury by contact with the vessel or other cargo, or by leakage. Confined to that purpose, the court is of the opinion that the weight of the evidence shows that it was sufficient, but if its purpose be extended as a means to protect the cargo stowed in the hold from being wet by bilge-water blown through the seams and crevices of a defective ceiling, the court is of the opinion that it was clearly insufficient to afford any such sufficient protection. Conclusive proof is exhibited that the ceiling was not water-tight, and all the witnesses examined upon the subject, except the head stevedore and one of his assistants, have

given evidence tending to convince the court that the salt water obtained access to the sheet iron through the ceiling. Testimony to the contrary comes chiefly from the stevedore, but his statements are so indefinite, contradictory, rash and inconsiderate, that they fail to secure the concurrence of the court in their accuracy. Beyond controversy the damage to the sheet iron was occasioned by blowing, by which is meant that the salt bilge-water found access to the iron, as stowed in the forward part of the after hold, through the seams and crevices of the ceiling, when the vessel rolled; from which it follows that the libellants are entitled to recover, and that the decree must be reversed. Separate findings of fact and law are required in an admiralty suit in the circuit court in all cases where the amount in controversy, on appeal, is sufficient to give the supreme court jurisdiction to re-examine the decree rendered in the circuit court; but where the sum or value in dispute does not exceed the sum or value of \$5,000, a more general finding of those matters in the opinion of the circuit court will be sufficient. 18 St. at Large, 315, § 1; 316, § 3; *1265 Vitrified Pipes*, 14 Blatch. 279.

Prior to the filing of the answer the libellants filed an amendment to the libel, increasing the *ad damnum* to \$4,000, and inasmuch as the respondents made no objection to the amendment it is deemed proper to regard it as having been duly allowed, as otherwise it would be allowed by this court. On June 16, 1876, the libellants asked leave to file a second count as an amendment to the libel, and the court ordered it placed on file, reserving the question of its allowance or disallowance to be decided at the final hearing. Pursuant to that order the amendment, as proposed, is allowed, but the additional amendment proposed at the argument, further increasing the *ad damnum*, is disallowed. Evidence as to the extent of the damage is contained in the record, and in view of that fact it is not necessary to refer the cause to a commissioner to ascertain the amount, the court being satisfied that the loss exceeds even the amended *ad damnum* of the libel, which is all the court can allow under the pleadings, except for costs which have arisen through the

fault of the respondents in not paying the just claim of the libellants. *The Wanata*, 5 Otto, 600, 612.

Decree of the district court is reversed, and a decree for the libellants entered for the sum of \$4,000, with costs.

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**FRIEMANSDORF v. WATERTOWN INSURANCE CO.**

(*Circuit Court, N. D. Illinois.* November 21, 1879.)

**FIRE INSURANCE—MORTGAGOR AND MORTGAGEE—PARTY TO SUIT.**—In an action upon a policy of insurance on mortgaged premises, the mortgagee is not a proper party plaintiff, where the policy was issued to the mortgagor, although made payable to the mortgagee.

**BREACH OF CONDITIONS.**—Any breach by the mortgagor of the conditions contained in such policy will avoid the same.

**RESTORATION OF PROPERTY.**—If the injured property is repaired by the mortgagor, no right of action remains upon the policy.

*Gary, Cody & Gary* for defendant.

*Hoyne, Horton & Hoyne*, for plaintiff.

BLODGETT, J. This is a suit brought on a policy of insurance issued by the defendant insurance company, dated the second day of February, 1877, to one Nigg, whereby the defendant insured George Nigg to the amount of \$1,500, against loss by fire or lightning, etc., on a two-story frame dwelling house, situate on lot 2, in block 31, in Cooksville, Illinois, loss, if any, payable to Henry Friemansdorf, as his interest may appear.

The suit is brought in the name of Friemansdorf, and the plaintiff avers that the policy was issued for the sole purpose of insuring the plaintiff, Friemansdorf; that a full disclosure was made to the defendant's agent of the plaintiff's interest, and that the defendant chose the form of policy which was issued; that the plaintiff paid the premium and has the sole right of action. The declaration, of course, avers the loss by fire of the property insured, and states that the plaintiff Friemansdorf had an interest to the extent of \$1,000 in the premises as mortgagee.

There are three pleas interposed to this declaration:

The first is, that the policy contained a clause that other prior or subsequent insurance, without the written consent of the defendant, should void the policy; and avers that there was at that time a policy outstanding held by Nigg, the mortgagor, issued by the Farmers' Fire Insurance Company, of Philadelphia, which was in full force at the time of the loss.

The second plea invokes the same clause of the policy, and avers that in violation of that clause of the policy there was outstanding at the time of the loss another policy of insurance issued by the Farmers' & Drovers' Insurance Company of Louisville, Kentucky, to Henry Nigg, and that the same was in force at the time of the fire aforesaid.

The third plea states that after the loss Nigg, the mortgagor, and owner of the equity of redemption of the premises, fully repaired the premises, without any expense to the plaintiff, whereby the plaintiff has sustained no loss or damage by reason of the said fire.

To these pleas the plaintiff has interposed a general demurrer, and on the part of the defendant it is claimed that as no plea of the general issue now appears upon the record, that this demurrer should be carried back to the declaration, and the question is made upon the argument of the demurrer that this suit cannot be maintained in the name of Friemansdorf, the mortgagee, and to whom the loss is to be payable.

I have no doubt but what the authorities, both in the state of Illinois and the United States, have now settled the law beyond all question or challenge, as far as this court is concerned, that upon a policy like this, issued to a mortgagor, and with the loss, however, directed to be paid to a mortgagee or any other encumbrancer or lienholder, the suit must be instituted in the name of the mortgagor, and cannot be instituted in the name of the mortgagee or the person to whom the loss is made specifically payable. The contract is really between the insurance company and the owner of the property, to whom the policy is issued. Legally, the contract is between the insurance company and the person to whom the policy runs, not to whom it or some portion of it may be made payable

in the event of a loss. Such is the uniform holding of the Illinois cases; and in the case of *Bates v. The Equitable Insurance Company*, reported in 10 Wall. 33, the same principle is established. In that case Philbrick, the party insured, received a policy, and afterwards he wrote upon the back of the policy, "Payable in case of loss to E. C. Bates," and signed "W. E. Philbrick," who was the original party to whom the policy was issued, and the agent of the company wrote underneath this indorsement by Philbrick as follows: "Consent is hereby given to the above indorsement. Equitable Insurance Company, by Frederick W. Arnold, Secretary;" so that it, in legal effect, made the policy precisely like the one now before us; that is, a case of a policy with loss, if any, payable to E. C. Bates, as his interest may appear. And the supreme court there held that the suit must be maintained in the name of Philbrick; that Philbrick was the insured, and any breach of the conditions of the policy by Philbrick voided the policy.

The same rule is held in the case of *Fitch*, reported in 51 Ill., and in the case of the *Home Insurance Company*, reported in 53 Ill., so that I have no doubt the law is well settled in this state as well as in the federal courts, as I have already stated.

There is a series of cases in the state of New York, commencing since the adoption of their code of practice, which requires that all suits shall be instituted in the name of the party in interest, where the courts have allowed a suit to be prosecuted in the name of the person to whom the loss was payable, where it was made to appear that the entire sum insured, or due, upon the policy, was going to the party bringing the suit, because such person was really the only person actually interested in the event of the suit. And the same rule has been held in the state of Wisconsin, because the state of Wisconsin has adopted, bodily almost, the New York Code; and there are a few cases in some of the other states depending upon similar reasons. But the general scope of authority throughout the United States, unless it is otherwise held by reason of some statutory legislation, has been and now is, undoubtedly, that all this class of policies

are really to be held as contracts between the insurance company and the mortgagor, and that any act on the part of the mortgagor which voids the policy, such as the violation of any of the conditions of the policy, is good as against the mortgagee or the person to whom the loss is payable.

The same rule is also applicable to the pleas that are interposed in this case. The pleas set up that there were outstanding policies, in violation of the conditions of this policy—other insurance, in other words, outside of the insurance upon this property which the insurance company had the right to stipulate in favor of Nigg—and by reason of such other insurance these policies have become void.

This policy sued upon having been issued to Nigg, I have no doubt that, although the loss was made payable to Friedmansdorf, he must lose the benefit of his insurance if there has been any violation of the conditions of that policy by Nigg, the mortgagor.

Under the authority of the cases which I have cited this suit, undoubtedly, should have been originally commenced in the name of Nigg. That is a mistake, however, which the plaintiff can now remedy, undoubtedly, by amendment, if he sees fit to do so. But the question arises whether, if the facts stated in these pleas are true, there would be any use of amending. If it is true that there were outstanding policies upon these premises in favor of George Nigg, contrary to the stipulations of the policy, and which would void it, then it seems to me that those facts would be fatal to the plaintiff's right of action in this case, and that if the demurrer be carried back to the declaration, and the court holds that the declaration is bad, for the reason that the suit could not be brought in the name of the present plaintiff, the amendment would do no good if the facts continue to exist.

With regard to the third plea, that the premises have been repaired, there is undoubtedly a conflict of authority, or an apparent conflict of authority, upon the question as to whether this defence can be set up. I do not think, however, that a careful examination of all the cases will show that there is

really any conflict of authority upon the subject. All the cases that I have examined—I have not had time to examine all of them—that have been cited in the brief of counsel, but those which I have examined have been cases where the policy was issued directly to the mortgagee. It has been held by the courts for many years past that a mortgagee could insure his interest in the premises by a policy of insurance running directly to himself, in which case the entire privity of the contract is between the insurance company and the mortgagee, to whom the policy runs. Upon that class of policies there has been a conflict as to whether, in case the premises were sold by the mortgagor, there was any right of action in favor of the mortgagee. But I think the better rule in reference to this class of questions is the one laid down by the supreme court of the state of New York, that a policy like this is not to be held as a policy issued to the mortgagee at all—not the insurance of the mortgagee's interest. It is an insurance of the mortgagor's interest in the property; but the mortgagor has, by the terms of the policy itself, directed the payment of the loss to the mortgagee to the extent of the mortgagee's interest, so that really the privity of the contract is all between the mortgagor and the insurance company.

In the class of cases which I have referred to where the conflict has occurred, it has been claimed on one side that the policy was issued for the purposes of direct indemnity to the assured, and that in case of loss the right of action enured to him, notwithstanding there might have been a complete reparation of the property by some other person than the insurance company; yet, a cause of action having arisen, the assured, having paid his premium, had the right to the indemnity which he had stipulated for. On the contrary, the other class of cases which have been passed upon, and the rule laid down, holds that where there is insurance effected for the benefit of the mortgagee, it must be concluded to be solely an insurance that the property shall remain unimpaired as security—that is, that there shall be no diminution of the value of the property as security for the mort-



gagee, and if there is really no such diminution there is no right of action, because he has sustained no loss. And there being no rule in the federal courts upon that subject, and this court having the right to assume and adopt such rule as it considers the most consonant with equity and justice, under the circumstances—having the right in a case of conflict between the state authorities to adopt that which seems to be the most consonant with justice—I think that the reasoning of the court in the case of the *Insurance Company v. Royal*, reported in 55 N. Y., is the most satisfactory. There it is held that the only purpose of the policy is to prevent a diminution or impairment of the mortgagee's interest in the property—its capacity to pay the mortgagee's debt; if that remains unimpaired, if the property is as good or is made as good after the fire as it was before, by reason of some other person's reparation of the property, that there is no right of action.

In this case the demurrer will be carried back, of course, under the pleadings and form of the suit, to the declaration, and the demurrer will be sustained to the declaration.

I have already intimated that I do not know what course counsel will feel disposed to take, but it seems to me that there is very little use in amending the declaration if the fact exists that is stated in the pleas.

MR. HOYNE: I would like to have time to consider whether I will amend or not.

THE COURT: Demurrer carried back to the declaration, and plaintiff has ten days to elect whether he will stand by his demurrer or not.

**PARSONS, Assignee, etc., v. CASWELL and others.**

(*Circuit Court, E. D. Wisconsin.* January 5, 1880.)

**BANKRUPT LAW—UNLAWFUL PREFERENCE OF CREDITOR.**—Although, under a sound construction of the bankrupt law, mere passive non-resistance by the insolvent debtor will not defeat a judgment and levy where the debt was due and there was no defence to the same, still, very slight evidence of an affirmative character of a desire to prefer a creditor, or of acts done to secure such preference, may be sufficient to invalidate the whole transaction.

Circumstances in this case considered, and held sufficient to establish the fact that certain judgments were obtained and executions levied through the secret co-operation of an insolvent debtor, and were therefore void.

*F. C. Winkler*, for complainant.

*E. Mariner*, for defendants.

DYER, J. This is a bill filed by complainant, as assignee in bankruptcy of Albert W. Coe, to annul and set aside certain execution levies in favor of certain creditors of the bankrupt, as fraudulent under the bankrupt law. The bill not only charges that judgments were obtained and the levies made for the purpose of securing to judgment creditors unlawful preferences, but attempts to charge that such judgments were obtained by actual collusion between the parties, and that some of the claims in favor of these creditors were in whole or in part fictitious, and had no foundation in actual indebtedness. Upon the argument the bill was much criticised by counsel for defendants, as insufficient in respect of such charges. However liable the bill may be to such criticism, I deem its allegations sufficient as charging the procurement of forbidden preferences by means of the judgments and levies, and through the aid and co-operation of the bankrupt.

The bill also seeks to avoid and set aside certain transfers of personal property made by the bankrupt to the defendant Caswell, to secure certain indebtedness owing by the former to the latter, and the allegations of the bill are also sufficient to the extent that they charge such transfers to have been preferential and unlawful.

Counsel for complainant, upon oral argument and in writ-

ten brief, attacked certain claims upon which the judgments in question were obtained as fictitious, and as created solely for the purpose of using them to accomplish, through the instrumentality of judgments and execution levies, fraudulent transfers of the bankrupt's property.

In deciding the case I shall proceed upon the assumption that all of the claims, as well those upon which judgments were obtained as those to secure which transfers of property were made to the defendant Caswell, were genuine and valid, and represented *bona fide* indebtedness from the bankrupt to the parties respectively holding such claims. And the single question will be considered in the light of the evidence, whether or not the judgments, executions, levies and transfers in question were obtained and made in contravention of the bankrupt law.

The bankrupt was a hardware merchant doing business in the city of Milwaukee. On the second day of November, 1876, the following judgments were entered against him in the state court, and executions were immediately levied upon his entire stock, except such portions as had been transferred to the defendant Caswell to secure other claims upon which judgments were not obtained, and to which more particular reference will hereafter be made: One judgment in favor of the defendant Caswell for \$5,776.42; one in favor of Albert E. Coe, the father of the bankrupt, for \$1,892; one in favor of Charlotte E. Coe, the wife of bankrupt's brother, for \$1,161.04; one in favor of Orra E. Benedict, sister of the bankrupt, for \$3,987.75; a second judgment in favor of the defendant Caswell for \$2,551.95; and a second judgment in favor of the defendant Albert E. Coe for \$567.78; the total amount of these judgments being \$15,936.94. The judgment in favor of the defendant Caswell for \$5,776.42 was rendered upon the following demands: A judgment note for \$4,780.76, dated July 3, 1876, due in one day; a judgment note for \$340, dated June 20, 1876, due in 30 days; a note for \$400, dated March 13, 1876, due in six months; a note for \$200, dated April 30, 1875, due August 1, 1876; a note for \$200, dated April 30, 1875, due September 1, 1876; a note for \$250, dated Sep-

tember 20, 1876, due on demand; a note for \$759.44, dated March 7, 1876, due in six months, and also a claim for three months' rent of store. The second judgment in favor of defendant Caswell, for \$2,551.95, was entered upon a judgment note for \$2,500, dated October 5, 1876, and due on demand; the judgment in favor of Albert E. Coe, for \$1,892, was entered upon a note for \$1,800, dated July 3, 1876; the second judgment in favor of the same party, for \$567.78, was entered upon a note for \$500, dated February 28, 1876, and due in four months; the judgment in favor of Charlotte E. Coe, for \$1,161.04, was entered upon a judgment note for \$1,092.75, dated July 5, 1876, and due in one day; the judgment in favor of Mrs. Benedict, for \$3,987.75, was entered upon a judgment note for \$1,000, dated June 12, 1875, due in one day, and another judgment note for \$3,000, bearing the same date, and due in one year from date.

The suits in favor of the defendants Caswell on his \$2,500 note, and Albert E. Coe on his \$500 note, were commenced October 12, 1876, and the other four suits were all begun on the same day, namely, September 23, 1876. In all the cases judgments were entered by default, and executions and levies were at once and simultaneously issued and made.

The transfers of property by the bankrupt to Caswell, to secure demands not put in judgment, and which are also by this bill sought to be set aside, were respectively made September 23 and October 28, 1876.

The execution levies upon the bankrupt's stock necessarily closed his business, and bankruptcy proceedings were instituted against him on the sixteenth day of November, 1876. If the judgments, execution levies and transfers in questions are sustained, it is understood that they exhaust the entire assets of the bankrupt, except uncollected merchandise accounts, many of which are worthless; and the great question in the case, and one which the court has very carefully considered, is, ought these judgments, levies and transfers, in the light of the facts and circumstances developed by the testimony, to stand as valid securities in favor of the defendants? And this question is settled when it is determined whether or

not the bankrupt co-operated in the transactions in question; that is, whether he did or did not, within the meaning of the bankrupt law, secure to these creditors preferences, by procuring his property to be taken on executions, for the purpose of satisfying the demands of these judgment creditors. If he did, then no matter what may be the resulting hardship to these creditors, these judgments and levies must fall, because they were obtained and made within the period before bankruptcy proceedings were commenced, which enables the assignee to attack them.

In *Wilson v. City Bank*, 17 Wallace, 473, the supreme court decided that, under a sound construction of the Bankrupt Act, something more than passive non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy on his property, when the debt is due and he has no defence; that in such a case there is no legal obligation on the debtor to file a petition in bankruptcy to prevent the judgment and levy; and that a failure to do so is not sufficient evidence of an intent to give a preference to the judgment creditor, or to defeat the operation of the bankrupt law. The court, speaking through Justice Miller, was at the same time careful to say that "undoubtedly very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to leave the matter to a jury or to support a decree, because the known existence of a motive to prefer, or to defraud the bankrupt act, would color acts or decisions otherwise of no significance. These cases must rest on their own circumstances." And it is noticeable of *Wilson v. The Bank* that it was a case destitute of any evidence of the existence of such a motive, unless it should be imputed, as a conclusion of law, from facts which the court did not think raised such an implication. Each case, then, must rest on its own circumstances, and it is apparent that the rule declared by the supreme court, that slight evidence of an affirmative character of the existence of acts done with a view to secure a preference may be sufficient to invalidate the

transaction, is a reasonable and proper one, because in many cases, as the court says in the case of Baker, 14 N. B. R. 436, "parties intend that the debtor shall preserve a nice equilibrium between acquiescence and co-operation," and under such circumstances the role is so difficult that slight *indicia* suffice to show that it has failed. In such cases courts are justified in being critical to detect these *indicia*, and should accord them ample weight when discovered."

Guided by this rule, which, as we have seen, has the sanction of the supreme court, we may proceed to look into the circumstances of this case. Publicity was given to the failure of the bankrupt on the second day of November, 1876, when his stock of goods was seized under the executions. That he was insolvent—that is, unable to meet his paper as it matured in the ordinary course of business—on and before September 23, 1876, is, I think, established beyond the necessity of discussion. The testimony shows that throughout the summer of 1876 his business was dull; that unusual measures were from time to time necessary to enable him to proceed successfully, and that, in fact, during that season, and at a time considerably anterior to his actual failure, failing circumstances began to be developed. That the defendants were chargeable with reasonable cause to believe the debtor to be insolvent, and that most of them knew that he was insolvent when they commenced their suits, is in my judgment equally well established. As we have seen, four of the suits were begun on the same day; two of them were begun on a later day, namely, October 12, 1876, and all the judgments were simultaneously entered. The executions were also simultaneously issued and levied, so that it appears to have been the intent that all of these judgment creditors should stand with reference to themselves upon an equal footing, and that all should secure an equal preference over other creditors who had no knowledge of these proceedings and were taking no steps to obtain security.

The defendant Albert E. Coe was the bankrupt's father, living in the state of New York, and I am convinced that, in

the steps taken to obtain judgments in his favor, the defendant Caswell acted as his agent.

The defendant Orra E. Benedict was the bankrupt's sister, living in Milwaukee. The defendant Charlotte E. Coe was the wife of bankrupt's brother, L. W. Coe, and he was the bankrupt's book-keeper and confidential clerk. The defendant Caswell had at some time been a hardware merchant in Milwaukee, had previously sold to the bankrupt his stock, was or had been the bankrupt's landlord, had had many business transactions with him arising out of loans of money, had evidently been for a considerable time in intimate business relations with the bankrupt, and at the time the suits in question were begun and the judgments rendered occupied as his office a room partitioned off in the bankrupt's store. All the suits upon which the judgments in question were rendered, were begun in a manner that avoided publicity until the judgments were rendered and execution issued, though this is a circumstance which I esteem of no consequence, since it involved nothing wrongful or unlawful on the part of the creditors.

It appears from the testimony that one Phelps, a salesman for certain creditors of the bankrupt in Chicago, was in Milwaukee on the twenty-first day of October, to look after the interests of his firm, certain agencies having reported that the bankrupt was refusing payment, or that his paper was being protested. This was after the suits in question had been begun, and this witness testifies that the bankrupt told him there was no reason for such reports; that there was no real foundation for any reports affecting his credit, and that he gave a sort of general assurance that he was solvent. Again, this witness was in Milwaukee on the second day of November, which was the day when the judgments were rendered, and he testifies that he asked the bankrupt if any suits had been commenced against him; that the bankrupt replied that two or three suits had been commenced in justices' courts for small amounts; that he had procured one or two to be adjourned, and that he would not allow judgment to be entered against him in favor of any one against the interests of all

the creditors. No information was communicated to the witness of the six suits which were then pending in the state court, and in which judgments were rendered on that very day. This was deceit on the part of the bankrupt, and it is not mitigated by anything which the bankrupt in his own testimony says upon the subject, for he admits that he had the alleged conversation with Phelps; that Phelps asked him whether there were suits commenced against him; that he answered that there were such suits in justice courts, and that these suits did not involve more than \$600; and in his answer to the petition in bankruptcy, sworn to November 27, 1876, he admits that he did not tell Phelps that the suits in which judgments were recovered were then pending. Here, then, was a creditor from abroad, who was seeking information directly from the bankrupt with reference to his financial condition, inquiring as to suits—as to *any* suit brought against him—and he is diverted from his line of inquiry and misled as to the real facts, by what is shown to have been clearly a deliberate suppression of a most vital fact, that on that very day cases pending against him in the state court in favor of relations and another creditor, to the amount of \$15,000, were ripe for judgment. Surely, this alone is a powerful circumstance of an affirmative character, tending to show at least the existence of a desire on the part of the bankrupt to prefer these creditors. In another part of his testimony he says that he does not know that he informed any creditor of the pendency of these suits against him, and that he does not think he would be apt to do so; and this would be undoubtedly true, if he was desirous that by means of judgments these creditors should obtain preferences, and especially if he was at the time by any affirmative action facilitating such a result. It is true the bankrupt further testifies that he thought he should get through and pay his debts, but that is no excuse for suppressing the truth when direct inquiry was made of him by one of his creditors, and is too unsubstantial to remove what appears to be good grounds for the belief that he was actuated by a motive to hide from view the movements of other creditors to secure preferences.



It appears further that one of the notes embraced in the first suit commenced by the defendant Caswell, namely, a note for \$250, was made on the twentieth day of September, 1876, three days before the suits were commenced, and was made payable on demand; that the note upon which the defendant Caswell, on the twelfth day of October, 1876, commenced his second suit, was made on the fifth day of October, 1876, was payable on demand, and was, moreover, a judgment note. It appears also that the demand for \$1,800 in favor of the defendant Albert E. Coe had been, previous to the time when suit was commenced, included in obligations against the bankrupt held by the defendant Caswell, and when it became necessary to bring a suit in favor of Albert E. Coe by name, it was essential that the obligation should run to him, and so, at Caswell's request, the bankrupt at that time gave a note for \$1,800 running to his father, and which was dated back to July 3, 1876, and made payable in one day from date, and the defendant Caswell testifies that, although he does not remember what he said to the bankrupt when this \$1,800 note was thus made, he did say to him in substance "what the case would require." It should be further stated that when this \$1,800 note was thus given the amount of it was indorsed upon the note held by Caswell, and which had, up to that time, included the \$1,800.

As I understand the testimony, the notes of Mrs. Benedict and Mrs. Charlotte E. Coe were, prior to the commencement of the suits in their favor, kept in the bankrupt's safe in his store, and were withdrawn from the safe for purposes of suit. In this connection the circumstances are significant that the commencement and pendency of the suits brought by Mrs. Charlotte E. Coe and Mrs. Benedict in no manner disturbed their relations with the bankrupt, nor was there any interruption of the business and confidential relations existing between the bankrupt and his brother, L. W. Coe, the husband of Charlotte E., for he continued to be the bankrupt's book-keeper and clerk, or agent, until the failure, although, as the testimony shows, he was attending to the

suit in behalf of his wife, and had also assisted Mrs. Benedict in the commencement of proceedings in her behalf. Mrs. Benedict testifies that she lived opposite the residence of the bankrupt; that not a word was said between them about her suit, and that it did not disturb their relations. The testimony shows that even after the suits were commenced, and up to the twenty-first of October, 1876, the bankrupt continued to order goods from houses in Chicago and elsewhere, buying upon credit and giving notes payable at times when he must have known he could not pay them, and all this when he likewise knew that suits were pending against him, and were almost ripe for judgment, to the amount of \$15,000, in favor of relations and of the defendant Caswell; and it appears that goods were thus ordered, not only by letters written personally by the bankrupt, but by letters and orders written and given in his behalf by L. W. Coe, his brother and book-keeper, who of course knew of his condition, and was acting at the very time as the agent of his wife in measures then in progress to secure to her the position of a preferred creditor by means of a judgment in the suit in her favor then pending. In a letter of date September 16, 1876, written by L. W. Coe, the bankrupt orders from Rathbone, Sard & Co., at once, a quantity of stoves. In a letter dated September 28, 1876, written by L. W. Coe for the bankrupt to A. A. Thompson & Co., a small remittance of \$227 was enclosed; collections were spoken of as very slow, and an order for goods to the amount of over \$1,000 was also sent. On the fourth day of October, 1876, the bankrupt, by letter, ordered from the Vulcan Iron & Nail Company two car loads of nails, one on 60 days' time, and one at four months. On the twelfth day of October, 1876, the bankrupt wrote to Rathbone, Sard & Co., ordering stoves. In a letter of October 13, 1876, written by L. W. Coe to Dwight Bros. & Co., he ordered three tons of felt paper, and in a letter of same date, written to Barrett, Arnold & Kimball, three tons of tarred felt paper were ordered, and on the twenty-first of October, 1876, he wrote to the Chicago Stove Works, sending them five notes, amounting in all to nearly \$2,500, and in which letter he

says that he has spread the accounts along through the following months of December, January and February, and tells them he presumes they have heard reports concerning him, but that they must not be alarmed, and he orders from them more goods.

Upon an examination of the accounts and books of the bankrupt the complainant assignee has testified that after September 23, 1876, when the suits in question were commenced, the bankrupt received new goods to the amount of over \$13,600, and that for these goods he had paid in cash but about \$2,300, the balance, amounting to over \$11,300, having been purchased on credit. Such conduct on the part of the debtor, at a time when the circumstances indicated so clearly that he must have known that he was hopelessly insolvent, and when all of these suits were hanging over him, makes it difficult to believe that his was the struggle of an honest debtor to weather the storm, but rather inclines a disinterested mind strongly to the conclusion that his purpose was rather to accumulate a fund which should beyond peradventure secure full payment to favored creditors, especially when we find that at the last his total liabilities amounted to over \$60,000, with a reasonable certainty that these creditors, by virtue of their levies and transfers, will exhaust his available assets.

Another circumstance sworn to by the defendant Caswell is this: Just before the levies there were some old goods belonging to the bankrupt upon Caswell's premises, which had been previously sold by Caswell to the bankrupt, and two or three days before the levies they were removed to the bankrupt's premises, and Caswell testifies that the bankrupt's men removed them by Coe's order; that it was "because they were going to be levied on," or, as Caswell expresses it in another part of the testimony, they were taken out "so as to be levied on, to be in the hands of the sheriff," as he, Caswell, did not want anything on his premises that would be levied on.

As avoiding the effect of this circumstance, counsel for defendants relied upon the case of *Louchien & Brother v. Henzy*,

18 N. B. R. 173, in which it was held that the mere fact that the debtor brought or caused goods to be brought within reach of execution, a short time before the sheriff's sale, which was closely followed by the commencement of proceedings in bankruptcy against him, is not sufficient to invalidate the sale. It is to be, however, observed of this case that it was because the single act of the debtor was unconnected with any other suspicious or doubtful circumstances that it was held insufficient to vitiate the whole sale—"the mere fact that the debtor brought or caused goods to be brought," etc., says the court. But in the case in hand we have many other circumstances which tend to taint the transactions in question, and, this being so, the removal of goods for the purpose of being levied upon forms a link in the chain, and by relation with other circumstances attains significance which it might not possess if it were an isolated circumstance alone relied upon to invalidate the transaction.

From the first of July, 1876, to the time of the bankrupt's failure, his note and bills-payable book shows a steady addition to the volume of his liabilities, only insignificant amounts being paid, except that as late as October 26th and 28th he paid to his wife's sister, a Mrs. Cleveland, \$740, in full satisfaction of notes which he had given her as late as October 13th and 14th, payable on demand, and one of which, as I understand the testimony, was a renewal of a note given in September. Goods which he purchased on credit, after the suits in question were begun against him, were among those levied upon to satisfy the executions.

Other transactions still transpired between the bankrupt and the defendant Caswell which tend to color the whole case. On the twenty-third of September, 1876, which was the day when the suits were begun, the bankrupt gave to Caswell his note for \$619.25, due in 30 days, and transferred and delivered to him goods, most of which were new, as security for the payment of the note; and on the twenty-eighth day of October, 1876, he gave to Caswell another note for \$535.69, payable on demand, and transferred and delivered to him, as security for the payment of this note, still other

goods, most or all of which were new goods. It is true that each of these notes represented in aggregate other liabilities previously existing, and for some or all of which Caswell had a certain character of security; but the giving of these new notes at such a critical time, and when the suits in question were commenced or pending, and for the payment of which the bankrupt, as I read the testimony, then gave to Caswell greater and better security than he before had, evidences an intention on the part of Caswell to acquire such security, and on the part of the bankrupt to give such a preference, as the law under the circumstances forbids; and this goes not only to the validity of these transfers themselves, but, as I have said, colors all the transactions under investigation, so far as motive, intent and acts are concerned. It is true that upon the liabilities which made up the note of \$535.69 Caswell had a certain character of security in the shape of a chattel mortgage, and a lease which contained a clause transferring to Caswell the personal property upon the leased premises, but it is very doubtful whether this security was valid, and it is evident that it was not relied upon as possessing the value which the emergency required. It is noticeable, also, that one of the notes which went into and formed part of the note for \$535.69, namely, a note for \$156.93, was not then due, and I am clearly of the opinion that these two transactions did not constitute an exchange of securities which may be protected within the rule laid down by the supreme court, and certainly, transpiring as they did, just on the eve of the bankrupt's failure, they tend strongly to show a deliberate purpose on the part of the bankrupt to prefer his creditor by giving to him the best security at his command. It was urged, upon the argument by the learned counsel for defendants, that the notes upon which the judgments in question were rendered were judgment notes; that the judgments were not obtained as speedily as they might have been, and that this is a circumstance tending to show that there was no such co-operation between the parties as will now be held to invalidate these liens; but all of the notes sued on were not judgment notes, and some were executed as if in preparation for

what followed, and it is quite evident that in the emergency it was by these judgment creditors deemed wise strategy to move unitedly for the accomplishment of the desired result.

There is testimony in the case to the effect that before suits were commenced by these judgment creditors the bankrupt begged further time from one or more of them; a fact which, if true, ought to be regarded by the court as a circumstance tending to repel the other theory of the case. But the testimony leaves it in serious doubt whether there was any very earnest expostulation after the suits were commenced, and it affirmatively shows that the bankrupt made no intercession with his father for further leniency, although he testifies that his father was a wealthy man in the state of New York. And the claim that after the suits were begun the bankrupt requested further delay, is quite inconsistent with his suppression of the fact that the suits were pending when he was inquired of by his creditors; and it is worthy of notice that, in his answer to the petition in bankruptcy, he in express terms admits that he was willing, in case he must fail, that the creditors who have recovered judgments should be paid in full, but he denied that he made any suggestion to any or either of them, directly or indirectly, that they bring suit and recover judgments, or levy their executions on his stock. And in his testimony in the present case he states that he had no particular desire in relation to those who sued him, except one, his sister, from which the implication follows that he *had* a particular desire with reference to the sister who had sued him.

On the whole, my opinion is that the circumstances of this case lead to the conclusion that the seizure of the bankrupt's property to satisfy the judgments in question was facilitated by the bankrupt; that the law was transgressed, and that these judgment creditors have secured illegal preferences, and in so holding I am not unmindful nor unappreciative of enunciations of the supreme court in this class of cases. I acknowledge the principle, so strongly enforced by that court, that something more than passive non-resistance in an insolvent debtor is necessary to invalidate a judgment and levy

under the bankrupt law; and if it be said that we have not, in the case at bar, direct proof of active participation by the bankrupt to facilitate his creditors in securing a preference, and that he was only silent under authorized legal proceedings, I must reply that the circumstances show it to have been but the outward silence of concealed co-operation. Decree for complainant.

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THE AMERICAN WHIP CO. v. THE HAMPDEN WHIP CO.

and others.

(Circuit Court, D. Massachusetts. February 2, 1880.)

INVENTION—WHIP TIP INDEPENDENT OF STOCK.—A whip tip, made independent of the stock, to which it may be fitted by means of a socket, is not alone such an improvement as may be patented.

LOWELL, J. Clark R. Shelton's patent, now the property of the plaintiffs, is re-issue No. 7382, for an improvement in whip tips. The specification represents that driving whips, especially long whips without a lash, are expensive, and frequently broken or frayed out at the tip end, and that several inconvenient and imperfect devices have been resorted to for repairing them. The patented improvement is to make a whip tip independent of the stock, and providing it with a socket which may be fitted to the stock. The particular mode described, which is mentioned as one of many possible modes, is to make a screw-thread on the inside of the socket of the tip, whereby the tip can be readily screwed upon the stock, and again removed at pleasure. The first claim is: "As a new article of manufacture, a whip tip provided with a socket, so as to be attached to the stock proper, as and for the purposes set forth."

The defendants make and sell a whip tip constructed after the patent of Edward B. Light, No. 154,876, which has a socket or ferrule, which fits the stock, and, instead of the screw-thread, the metallic ferrule has certain pieces partly

cut out in such a form that they may be pressed or hammered into the stock and hold it like dogs. In the Light patent they are called hook-shaped teeth, formed out of the ferrule.

The idea of making a separate tip for whips belongs to Shelton, and has been found to work a great improvement in the trade. The idea is borrowed by the defendants, and, if the plaintiffs can hold a broad claim for the independent tip, there is no doubt of the infringement. It is in evidence, and is well known, that fishing rods had been made in sections before the invention of Shelton, and the tips of these rods were so made with sockets as to be fitted to or removed from the next joint, at pleasure. These sockets were not usually fastened with a screw-thread, and I doubt if any were so fastened in the mode of the patent before its date. The joints which came together were so nicely fitted by their ferrules that they were held for a practically useful purpose by adhesion or friction. Before the date of the patent, whips had been made in sections by a traveling agent, not, however, for sale in that form, but for convenience of packing in a trunk. The plaintiff's expert testifies that a sample of these sectional whips would not work well, because the parts were so loosely united that the tip would come off when a smart blow was struck. This is a matter of adjustment. There can be no doubt, I suppose, that a whip tip might be united to the stock in a useful way after the old fashion of the fishing rod.

These being the facts, although the merits of the adoption of this form of manufacture in the trade is great, I feel constrained by the authorities to hold that the patent is for little more than the application of an old art to a new use analogous to that of making fishing rods. To sustain the patent, therefore, it must be confined to the particular improvement of the screw-thread; and, so construed, I do not find it infringed by the defendants.

Bill dismissed, with costs.



PHALON v. THE HADJI.

(District Court, E. D. New York. January 5, 1880.)

**ADMIRALTY—NEGLIGENCE.**—It is not negligence to cover the lower deck beams of a steamer with loose planks, for the purpose of stowage, when the party injured has notice of the manner in which they are placed, and uses the same without any necessity.

BENEDICT, J. This is an action *in rem* to enforce a lien upon the steamship Hadji for the damage sustained by the libellant by reason of injuries occasioned by his falling from the between-decks to the lower hold of that steamship in the port of New York, on the eighth day of September, 1877.

The following are the facts: The steamship was an open-beam vessel; that is to say, she had beams running across the hold on which a lower deck could be, but never had been, constructed. Vessels of this description are not uncommon. They are not unfinished vessels, but a kind of vessel used in navigation. The lower deck beams of this one were about seven feet apart; around the sides of the vessel, at the end of the beams, was a stringer, forming a passage on which a person could pass in safety fore and aft in the between-decks, and which was used for that purpose. There were also beams some two feet wide running across the vessel, capable of being used and actually used to pass from one side of the between-decks to the other.

The steamship in this condition was taking in cargo, and certain deals in the lower hold being found to be in the way were removed to the between-decks and laid upon the lower deck beams. They were not laid for the purpose of forming a deck or to be used to support cargo, nor were they to remain there, but were simply placed on the beams temporarily, because they were in the way elsewhere. These deals, when so placed, extended from the stanchions amidships to the stringers in the wings, on each side, and for the most part covered the deck beams from the fore hatch forward. They were not fitted to each other or in any way secured to the beams, but simply laid side by side fore and aft upon the beams, in some

places lapping over each other. Between the stanchions amidships were open spaces; and in one place, just aft the forward beam, several of the deals were too short to extend to the forward beam, and these were therefore left with one end unsupported by a beam.

The libellant was employed to assist in stowing the cargo of the steamer. In the course of such employment he was directed to go to the eyes of the ship for some dunnage. No directions were given as to how the libellant was to go forward. He might have gone upon the stringer with safety. Instead of so doing he went upon the deals that were lying upon the beams. While so proceeding he stepped upon the unsupported ends of the deals that failed to extend to the forward beam. The deals tilted under his weight and he was precipitated to the lower hold, several deals falling with him, and thus received the injuries complained of.

Upon these facts the first question arising is, whether negligence has been proved. Clearly it was not negligence to allow the lower deck beams of this steamer to remain uncovered by a deck. The owners of the vessel had the right to construct and use their ship without any lower deck upon the lower deck beams. Such a between-decks being a common feature in ships, it cannot be held that a vessel so constructed was an improper vessel so far as her construction was concerned.

Neither was there any negligence in using the lower deck beams for the purpose of stowing loose plank upon them for a temporary purpose; such a use of this portion of a vessel is not unusual or improper. If there was any negligence it was in placing the loose deals upon the beams in such a manner as to leave their ends unsupported at the place where the libellant fell. But as already stated the deals were not intended to serve as a deck, nor was it necessary to go upon them in order to reach the place to which the libellant was sent for dunnage. There being no duty on the part of the ship to maintain a deck in the between-decks, and the evidence rendering it impossible to hold that the deals formed a

deck, it is difficult to see any ground upon which to hold that negligence has been proved.

It is said that the deals were so placed as to create the belief in any one required to go into the between-decks that a deck had been constructed there, and that the responsibility is therefore the same as if an improper and unsafe deck had in fact been constructed there. But, whatever might be the responsibility in such a case, no such case is made out by the evidence. The deals were not so placed as to justify the libellant in believing that he was proceeding upon a deck. The deals were rough, they were laid loosely without any fastening whatever, and, according to the evidence, were not evenly laid, but in some places lapped one upon another; moreover, the spaces between the stanchions were open. These openings were plainly visible, and were notice to all who might go upon the deals that they were not upon a deck.

The case is that of a use, by the libellant, of the deals for a purpose for which they were not intended, without necessity, and with fair notice from the manner in which they lay that they were not intended to be so used.

Such a case is not one in which it can be held that the injuries to the libellant were caused by negligence on the part of the ship owner, or of those entrusted with the care and management of the ship.

The libel must therefore be dismissed, and with costs.

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#### KEROSENE LAMP HEATER COMPANY v. FISHER.

(*Circuit Court, D. Massachusetts.* January 20, 1880.)

PATENT CASE—PRACTICE.—Modes of proceeding before a master to whom a patent case has been referred.

LOWELL, J. Some questions are raised relating to the modes of proceeding before a master to whom a patent case has been referred, in certain particulars in which the practice of different masters is said to differ, and I have consulted with Judge Nelson as to the answers which should be given.

We consider that the practice adopted by Mr. Stetson harmonizes better with the rules than that which was adopted in this case. The practice which we approve is this: The master appoints a day for proceeding with the reference, and gives notice, by mail or otherwise, to the parties or their solicitors. We think the solicitor should be notified, whether the party is or not; though, probably, under rule 75, notice to the party is a good notice. If the defendant does not appear, the master proceeds, *ex parte*, and makes out the profits and damages, if he can, from the evidence produced by the plaintiff. If it appears that an account of profits is necessary to a just decision of the cause, and is desired by the plaintiff, he makes an order that the defendant furnish an account by a certain day, and adjourns the hearing to that day. The defendant should be served personally with a notice of this adjournment, and of the order to produce his account, if it is intended to move for an attachment in case he fails to appear. The service may be made by any disinterested person, and need not be by the marshal. If the defendant then fails to appear and account, he will be in contempt.

The mode of proceeding which we do not approve, is for the plaintiff to take out a notice, in the first instance, before any hearing has been or can lawfully be had, requiring the defendant to furnish an account by a certain day on pain of punishment for contempt. We doubt the power of the master to make such an order upon a mere inspection of the record, and we consider the practice inexpedient if it is lawful.

The defendant's first objection is sustained. His objection, which is of more real importance in most cases, that the service must be by the marshal, we overrule.

## HAYDEN v. THE ANDROSCOGGIN MILLS.

## HAYDEN v. THE BATES MANUFACTURING COMPANY.

(Circuit Court, D. Massachusetts. November 20, 1879.)

FOREIGN CORPORATION—JURISDICTION.—A foreign trading corporation may be sued in the circuit court for the district of Massachusetts, although the property of the defendant has not been attached, where such corporation is doing business within the state, and the summons has been duly served upon an officer of the company.

The plaintiff in the case first above named, by his writ, commanded the marshal to attach the goods or estate of the Androscoggin Mills, "a corporation duly established by the laws of the state of Maine, and doing business in Boston," to a certain value, and "to summon the defendant." The declaration was in trespass, for damages for the alleged infringement of a patent granted to the plaintiff. The return of the marshal was that he had attached a chip as the property of the defendant, and had delivered a summons to T. W. Walker, the president of the company.

The defendants appeared specially, and moved to dismiss.

The second case was in all respects like the first.

*Henry D. Hyde* and *Elmer P. Howe*, for the defendants, distinguished *Ex parte Schollenberger*, 96 U. S. 369; *Williams v. Empire Transportation Co.* 14 Off. Gaz, 423; *Packing Co. v. Hunter*, 7 Reporter, 455, in that the service in those cases was precisely such as the state courts required to be made upon foreign corporations, while in Massachusetts an effectual attachment of property must be made in such cases. *Andrews v. Mich. C. R. Co.* 99 Mass. 534; *Peabody v. Hamilton*, 106 Mass. 217.

*R. Lund* and *D. F. Crane*, for plaintiff.

LOWELL, J. The important point of jurisdiction intended to be raised by the defendants cannot be decided in their favor, upon a motion to dismiss, because it is entirely consistent with this record that the defendants should have an agent here expressly authorized to accept service, or that some other fact should exist which would prove the defendants to

be subject to process here under the recent decisions. Such a motion is not well advised for another reason: that the supreme court might, in one event, refuse to revise my action. *Toland v. Sprague*, 12 Pet. 300.

As the point has been fully argued, I see no impropriety in my giving my opinion upon it, taking the facts to be as I understood the parties to state them. Those facts are, that the corporations are chartered in Maine, and have each a principal, if not the principal, place of business in Massachusetts, where most of the business, financial and other, except the actual manufacture, is done, and indeed from which the manufacture itself is directed and controlled. I suppose that most of the stockholders and officers live here. I do not mean to say that this fact alone would be very material.

The question is, whether such a corporation is suable here in a transitory action begun in the circuit court of the United States without an effectual attachment of property.

The acts of congress from the beginning have prohibited the maintenance of original civil suits against any one unless he shall be an inhabitant of or be found within the district where the suit is brought. The foundation of natural justice upon which this practice was supposed to rest has been much weakened by the decision that, in admiralty, a personal action may be maintained against an absent defendant by attachment of his goods. *Atkins v. Disintegrating Co.* 18 Wall. 272.

Formerly the circuit courts, following the high authority of Mr. Justice Nelson, were accustomed to hold that a corporation could not be "found" beyond the limits of the state or country by whose authority it was chartered. This rule worked badly, and especially in patent cases, for if a corporation by its agents maintained a flagrant breach of a patent right within any judicial district, there was no adequate redress in the place of infringement; and if the corporation happened to be chartered in Europe, or South America or Canada, there was no adequate redress anywhere within the United States, for no one will affirm that the power to enjoin the agent and to sue him personally for damages will meet the requirements of all or of most patent cases.

Fortunately the supreme court have taken a different view of the subject, and in three decisions have held, in the first, that a corporation may be found in any place where it has exercised its corporate powers by express consent of the legislature; and in the second and third, that a foreign company, which is required by a general law of the state to appoint an agent for service of process, as a condition to its transaction of business in the state, may be sued in either the state or federal courts. *Railroad Co. v. Harris*, 12 Wall. 65; *Lafayette Ins. Co. v. French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369.

Since these decisions were made two cases have arisen in the circuits in which the general laws of a state making foreign corporations suable have been applied to suits in the courts of the United States, held within that state, without the appointment of an agent for that particular purpose. *Williams v. Empire Transportation Co.* 14 Off. Gaz. 523; *Wilson Packing Co. v. Hunter*, 7 Reporter, 455.

The case before me differs from any which has been decided in this: By the statutes of Massachusetts, as construed by the supreme judicial court, actions against foreign corporations must be begun by effectual attachment of property. *Andrews v. Mich. Cent. R. Co.* 99 Mass. 534. Here there was no such attachment. The Massachusetts law gives their courts jurisdiction when there is an attachment, though the corporation is not found in the state, having no agent or place of business there. Under our statutes an action cannot be begun in that way in the federal courts unless the defendant is found here. Therefore if there had been an attachment in this case the question would still remain, whether the defendant had been found here. Now no Massachusetts case, that I have seen, holds that a foreign trading corporation, having its principal establishment here, is not found here, but must be brought in by publication, as in the case of a defendant actually absent. As attachment cannot give us jurisdiction, so the want of it cannot, in my opinion, take it away, if the defendant is here. The service is sufficient in form by the law of this state, and would bind a domestic corporation in

the state courts, and I think it would likewise suffice for a foreign corporation, except for the general rule requiring attachments against them, which cannot affect us.

I think a trading corporation may be said to be personally present for the purposes of an action wherever it has an established place of trade. This was so decided in England on principle, and as a new question, as late as the year 1872. *Newby v. Von Oppen*, L. R. 7 Q. B. 293. That was the case of the Colt Patent Arms Company, having a house in London for the sale of its manufactures. In the only other case that I have seen the ticket office of a railroad company was held not to be such a place of trade as to give jurisdiction, and the court say that the question is one of fact in each case. *Mackereth v. Glasgow R. Co.* L. R. 8 Ex. 149.

In the United States most of the cases turn upon the words of a statute, but the reasoning is often more general, and is, I think, in substantial accordance with the law of England, namely, that a trading corporation is of right suable in any country in which it conducts an important part of its business. Accordingly the tendency of opinion, if I may so call it, is to apply general words concerning corporations to include foreign corporations under those circumstances. See *Angell & Ames Corp.* §§ 402-406; *Rorer Inter-State Law*, 282.

Upon the whole I think I am authorized to decide that a foreign corporation may be sued in the circuit court here under the circumstances existing in this case as I understand them; though the fact of attachment, immaterial to our jurisdiction, does not exist.

If the question should be brought up in some new form, and the facts should prove to be different, my decision may be different.

**Motion to dismiss denied.**



## THE UNITED STATES v. THE PACIFIC RAILROAD and others.

(Circuit Court, E. D. Missouri. March 13, 1880.)

**INCOME TAX—DEMAND—LIEN—TIME IT ATTACHES—PROPERTY IT ATTACHES.**—The lien of the income tax (Act July 13, 1866, 14 St. at Large, 107; Rev. St. § 3186) relates back, upon demand, to the time when the tax was due, but only attaches to the property belonging to the person from whom the tax was due at the time when the demand for the payment of the tax was made.

**SAME—LIEN, HOW CREATED.**—The assessment of such tax by the assessor, in the mode prescribed by law, is essential to the creation of such lien.

In equity. Demurrer to bill.

MCCRARY, J. This is a bill in equity, filed by the United States, to enforce a lien upon property, formerly owned by the Pacific Railroad, for taxes amounting in the aggregate, including penalties, to something over \$135,000. The tax claimed as delinquent accrued during periods of time extending from July 1, 1864, to February 28, 1871, and is the income tax, or the tax upon the receipts and profits of said company during those periods. When the tax accrued the Pacific Railroad was the owner of the property against which the lien is sought to be enforced, but since that time several large mortgages have been executed upon the same, and under a foreclosure of one of these the property was, on the sixth of September, 1876, sold to one James Baker, who, on the twenty-first day of October, 1876, conveyed the same to the Missouri Pacific Railroad Company, the present owner. The last-named company mortgaged the property November 1, 1876, to secure bonds to the amount of \$4,500,000. The present owner, as well as the several lien holders, are made parties, and the prayer of the bill is for decree declaring the taxes aforesaid to be a lien on said property prior and paramount to any claim on their part, and for a foreclosure and sale. It is conceded that the tax was never assessed by any officer of the government, but it is insisted that this was not necessary, because there was an assessment by operation of law which was equally effective. The bill avers that demands were made for

the payment of the taxes claimed on the second of November, 1877, and on the sixteenth of July, 1879; both dates being subsequent to the execution of the several mortgages aforesaid, and also to the purchase of the property by the present owner.

The defendants demur to the bill upon the ground that the same constitutes no cause of action, for the following, among other reasons:

"That even if the complainant has a lien it only took effect at the time the demand is averred to have been made, and so is subject to the title of the mortgagees and purchaser represented by the defendants."

In considering the demurrer we are called upon to construe the statute under which the lien is claimed. This statute is found in the act of July 13, 1866, (14 Stat. 107,) and is also embodied in section 3186 of the Revised Statutes, and is as follows:

"And if any person, bank, association, company or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States, from the time it was due until paid, with the interest, penalties and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company or corporation."

The question is as to the meaning of the words "upon all property and rights of property belonging to such person, bank, association, company or corporation." Does the language apply to the property belonging to the Pacific railroad when the taxes accrued, or only to that belonging to that company when the demand by which the lien was created was made?

It was said by Mr. Justice Miller, in *United States v. Pacific Railroad*, 4 Dillon, 71, that "in construing this section it is proper to consider the extraordinary nature of this lien. It is," he said, "not only a lien upon the land, but is a lien upon the personal property; it is not only a lien upon property in possession, but upon all rights to property depending upon contracts, and upon unexecuted contracts; it not only creates a present lien, but it relates back." He further observes

that the demand may be made long after the maturity of the tax, and will create a lien which relates back and establishes itself upon "the property or rights of property of the defendant." The question in that case was as to the sufficiency of the demand, and the precise point now under discussion did not arise; but I think I am within the spirit of that opinion when I say that the statute should not be construed as subjecting property which has been conveyed to innocent purchasers, prior to any demand, unless this is its plain meaning. The consequences of such a ruling would be so serious and far-reaching that I should not be willing to invoke them by any doubtful interpretation. There is no limitation as to the time within which the government may proceed against persons who failed to comply with the income and other internal tax laws. I have no doubt such persons are numerous. Many of them may be insolvent now, but may have owned property, when the taxes accrued, which has since passed through many hands. The law may well be liberally construed and rigidly enforced as against the guilty, especially where they have concealed their property or otherwise attempted to evade their just obligations to the government. But if, upon making demand now, at the end of 12 or 15 years from the time when the taxes were due, the government can establish a lien upon all the property then owned by the delinquent tax payers, it would result that in most cases not the guilty, but the innocent, would be made to suffer. Such a doctrine would also unsettle the titles to real estate, since it would be impossible to know or to ascertain whether the owner has not, during the existence of the income tax law, suppressed the truth as to his receipts and earnings, or made a false return thereof. In my opinion the language of the statute does not require the construction contended for by counsel for the government. If congress had intended to make the statute so far-reaching as to subject property in the hands of innocent purchasers, who became owners years before any step was taken by the government to assert its lien, this intention would have been plainly expressed. Such, however, is not the case. Let us examine the phraseology:

"If any person, \* \* liable to pay a tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, \* \* \* upon all property, etc., *belonging to such person*," etc. The statute does not say "upon all property which may have belonged to such person when the tax accrued."

This or similar language would, I think, have been employed if congress had intended to give the statute this effect. It must be conceded that the words "all property \* \* \* belonging to such person" must be construed as referring to some time to be ascertained by the context; and it may also be conceded that we might, without doing violence to the *language* of the law, refer them to the time when the tax became due, and make the clause read "all property, etc., belonging to such person, etc., at the time the tax became due." This, however, does violence to the spirit of the act for reasons already stated. Another reading is authorized by the language, and is in harmony with the spirit, and that is the one I have adopted, namely, that the words in question refer to the time when the demand is made, and may be phrased thus: "All property, etc., belonging to such person at the time such demand is made." By this construction the lien, when it once attaches, relates back to the time when the tax was due, but it does not attach to the property transferred to innocent purchasers prior to demand. This view also harmonizes with the general policy of the law relating to land titles, which is to protect the citizen against loss from secret liens, not disclosed by any public record nor ascertainable by due diligence. Nor is it unjust toward the government, for it is fair to presume that the government, armed as it is with so many agencies and appliances for ascertaining what taxes are due and unpaid, and from whom, and all-powerful as it is to enforce its rights, will, within reasonable time, make demand, or take some steps in the direction of making collections, in all cases where there is delinquency. The government may protect itself by diligence if the view I take of the statute shall prevail; but, if the opposite view is sus-

tained, the citizen who purchases real estate is absolutely without protection against possible liens for taxes of this character.

Another ground of demurrer is as follows: "Because it appears that no assessment return or list was ever made of said taxes, and so there can be no lien therefor."

The question whether an assessment by the assessor or other officer, authorized by law to make it, is a necessary step in the creation of a lien for taxes under the internal revenue laws, is, so far as I know, undecided. The laws provided for assessors, whose duties were very particularly prescribed. They were clothed with power to summon any person failing to deliver a list or return of taxes within the time required, or making a false return, as well as any other person, whether residing within or without the state, for the purpose of requiring testimony under oath respecting any objects liable to tax, and disobedience to such summons was made punishable as a contempt of court; and, in case any person or corporation failed to make a proper and true return, the assessor was required, from the best information he could obtain from an examination of witnesses, and on his own view and information, to himself make a list or return of all such person's taxes, including special and income taxes. The assessor was authorized to hear and determine appeals concerning taxes returned in the annual list, and after disposing of these he was to make out lists containing the sums, payable according to law, upon every subject of taxation for each collection district, which list was to contain the name of each person residing in said district liable to tax, and to furnish to the collectors of the several collection districts, respectively, copies of such lists. The collector was required to receipt for said lists, and thereupon to give public notice that the taxes therein specified had become due and payable, and to fix a time and place within the county at which he or his deputy was to attend and receive the same. Then follows the provision already quoted providing that if any person, bank, association, company, or corporation, liable to pay any tax, should neglect or refuse to pay the same after demand the amount should be a lien,

etc. I have given, without quoting at length, the substance of the provisions of the revenue laws applicable to the questions now under consideration, as they are found in the acts of June 30, 1864, (13 Stat. 223,) and of July 13, 1866, (14 Stat. 97.) The question is, whether the several steps in the preparation of the assessment lists and their return to the collector must precede the demand, which is the foundation of the lien. The supreme court has decided in two cases that the obligation to pay the tax does not depend on an assessment made by an officer, but that, the facts being established on which the tax rested, the law made the assessment, and an action of debt could be maintained to recover it. *The Dollar Savings Bank v. United States*, 19 Wall. 227; *King v. United States*, 99 U. S. 229.

The question in these cases was, however, simply as to the liability of the delinquent himself when sued in an action of debt for taxes due and unpaid, but never assessed by an officer. The present is a very different case; here the object is not to enforce a common law remedy in the collection of an admitted indebtedness, but to enforce a statutory lien against property which was once the property of the debtor, but is now in the possession and ownership of others. It is well settled that, in order to support and enforce a statutory lien for taxes, all the prerequisites of the laws granting the lien must be strictly complied with. *Thatcher v. Powell*, 6 Wheat. 119; *Parker v. Rule's Lessee*, 9 Cranch, 64; *Rouhendorf v. Taylor*, 4 Pet. 349; *Stead's Ex'r. v. Course*, 4 Cranch, 403; *Early v. Doe*, 16 How. 618; *Williams v. Peyton's Lessee*, 4 Wheat. 77; *Mayhew v. Davis*, 4 McLean, 213, 217; Hilliard on Taxation, 291; Cooley on Taxation, 258, 259; 2 Dillon on Mun. Corp. § 658.

The distinction between a suit to enforce a lien of this character, and an action at common law to recover judgment for unpaid and past due taxes, was clearly recognized and strongly stated by Mr. Justice Miller, in his opinion in the former case in this court, between the parties to this suit, already cited, (4 Dill. 71,) in which he said, in referring to a suit to enforce such a lien: "All this is a very different

thing from the collection of the taxes by the ordinary processes of distraint, or by a suit against the party for the amount of them. In an action of debt no such demand is necessary for the collection, as the supreme court of the United States has decided, because, when the dividends are declared, or the interest paid, the law annexes to it the obligation to pay 5 per cent. on that amount. But the law does not annex to that any lien on a man's property. The law does not annex to those taxes, *astaxes ex proprio vigore*, any lien."

In the same opinion he further said that, in view of the extraordinary character of this statute, and of the lien created thereby, "it is reasonable, and it is proper, that all the steps which the law requires of the party creating the lien in his own favor shall be pursued strictly."

Is, then, the assessment (in a case like the present, where no return was made) one of the steps required by the law in the establishment of a lien? I am clearly of the opinion that it is. The regular order established by the statute is:

1. The return or the assessment by which the amount of the tax is fixed. 13 Stat. 225, 230, §§ 12, 21, inclusive; 14 Stat. 101, 104.

2. The notice that the taxes are due, and informing tax payers of the time and place of payment. 13 Stat. 232, § 28; 14 Stat. 106.

3. The demand for the payment of the specific sum due from the individual tax payer who may have neglected or refused to pay the same. 14 Stat. 107.

I do not feel at liberty to hold that any one of these steps is non-essential. A demand implies the previous ascertainment of the sum due, and this ascertainment is by means of the return or assessment.

The lien is not created by the law itself, without any action by officers under the law, though a debt may be thus created. The liability of the tax payer is one thing; the creation and enforcement of a lien, especially against innocent parties, is another and very different thing. What I have said is of

course conclusive of the case, and the other questions discussed by counsel need not be considered.

The demurrer is sustained.

TREAT, J., concurs.

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### THE UNITED STATES *v.* MCCARTNEY and others.

*(Circuit Court, D. Massachusetts. January 16, 1880.)*

**COLLECTION OF INTERNAL REVENUE—OFFICIAL BOND—SUBSEQUENT LEGISLATION.**—The official bond of a collector of internal revenue is applicable to the payment of certain store-keepers, under an act of congress providing for the appointment and payment of such store-keepers, enacted subsequently to the execution of such bond.

This action was prosecuted against the sureties upon an official bond; the principal was named as a defendant, but was absent from the district and was not served with process. In June, 1866, McCartney was collector of internal revenue for the third collection district of Massachusetts, and was duly directed by the secretary of the treasury to act as disbursing agent for that district, in accordance with section 4 of the act of March 3, 1865, (13 Stats. 483,) and gave the bond in suit, which recites McCartney's position as collector, and that the secretary has directed him to act as disbursing agent to pay the lawful expenses incident to the various acts relating to the assessment and collection of the internal revenues; and is conditioned that McCartney, collector as aforesaid, shall faithfully perform his duties as such disbursing agent, and shall properly account for and pay over all moneys that may come into his hands as such disbursing agent.

The course of business was for McCartney to make requisitions for the sums which he expected to need, and for the department to send drafts for the amounts, or so much as they thought necessary, which drafts were deposited by McCartney, who drew checks to pay the several expenses, which, before the passage of the act of 1868, presently to be men-



tioned, consisted of his own commissions and his salary, and that of the assessors, assistant assessors and clerks, and the general expenses of his office.

It appeared, by duly verified transcripts from the books of the treasury department, that McCartney received drafts monthly from the government on this disbursing account, and rendered monthly returns from June, 1866, to the end of March, 1869. He went out of office May, 1, 1869, and it did not appear that he had either drawn or paid out any moneys during the month of April, and there was some evidence that he had done neither. A balance of \$7,155.17 appeared to be left in his hands by his latest return, from which had been deducted by the department his compensation for April, and some other allowances, leaving apparently due the sum now demanded, \$3,545.92.

The act of July 20, 1868, (15 Stats. 145,) provided for the appointment of store-keepers, by the secretary of the treasury at a compensation to be fixed by the commissioner of internal revenue, not exceeding five dollars a day, and, by the papers in the case, it appeared that McCartney claimed credit for payments to such store-keepers amounting in all to \$3,572.57, and that the department had allowed him on that account \$3,293.99. This was all the evidence tending to show that McCartney had been required, as such disbursing agent, to pay the fees of store-keepers under the act of 1868.

The plaintiffs offered to put in evidence certain other papers purporting to be copies of the monthly requisitions of McCartney for money to pay his various disbursements, with the action of the department thereon, for the purpose of showing how much money was drawn for the payment of the fees of store-keepers. These papers were under the seal of the treasury department and the signature of the secretary, but not that of the register, and were excluded by the court.

The learned judge was asked by the defendants to rule that the bond was avoided by the passage of the act of 1868, and the action under it; and the plaintiffs contended that it remained wholly valid, and required a due accounting for the expenses of store-keepers. The court ruled that the bond

did not require the sureties to make good any loss arising in respect to the fees of storekeepers, and that there was no sufficient evidence what part, if any, of the balance of McCartney's last account, as since reduced by credits, was due in respect to these fees, and ordered a verdict for the defendants.

Before the trial by jury, a demurrer, interposed by the defendants, was overruled.

The case was heard in this court upon the plaintiff's exceptions.

*P. Cummings*, Assistant Attorney of United States, for plaintiff.

*S. B. Ives, Jr.*, for defendants.

LOWELL, J. The learned judge of the district court ruled, as I think I should have ruled in his place, that the bond remained valid only in respect to those disbursements which could have been required to be made by the collector under the law as it stood at the date of the bond. That this ruling was sound so far it sustained the obligation for the original duties of the principal obligor, if the evidence was such that the amount due for a breach of those duties could be discriminated from that which arose from a failure in the new duty, is not to be doubted. *Gaussen v. U. S.* 97 U. S. 584; *U. S. v. Singer*, 15 Wall. 111; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *Com. v. Holmes*, 25 Gratt. 771.

A careful examination of the subject convinces me that a ruling should have been given, as prayed by the plaintiffs, that the bond was applicable to the pay of store-keepers, as well.

It is said by a late learned commentator that, according to the weight of authority, the sureties of an officer, upon his official bond, are liable for the faithful performance of all duties imposed upon the officer, whether by laws enacted previous or subsequent to the execution of the bond, which properly belong to and come within the scope of the particular office, though not for those which have no connection with it, and cannot be presumed to have been within the contemplation of the parties at the time the bond was executed. Notes to

*Rees v. Berrington*, 2 Lead. Cas. Eq. (4th Am. Ed.) 1867-1913. The language used in the foregoing extract is taken from one of the decisions which I shall cite, and the context and citations show that it refers to public officers, and to the weight of authority in the United States. A similar statement is made in *Brandt's Suretyship*, § 469. I have examined the cases cited by these authors, and some others, and find their positions to be sustained.

The sureties of a postmaster are not discharged by the subsequent passage of an act raising the rates of postage. *Postmaster Gen. v. Munger*, 2 Paine, 189; *Boody v. U. S.* 1 W. & M. 150. It was held in *White v. Fox*, 22 Maine, 341, that the sureties of a clerk of court remain liable though a penalty of 25 per cent. per annum is afterwards imposed by law for a failure by the clerk to pay over his surplus fees in due season. In that case *Shepley, J.*, said: "If the sureties on the official bonds of persons holding offices created by law, and the duties of which are prescribed by law, were to be discharged by every change of the law relating to the duties, it would, in these days of over frequent change, be to little purpose to trouble officers to obtain sureties. There is little of similarity between such cases and those arising out of offices or trusts whose duties are assigned or regulated by contract." Page 347.

Like decisions have been made in several states and circuits in regard to sheriffs, constables, collectors of taxes, collectors of customs, and other officers. *Illinois v. Ridgeway*, 12 Ill. 14; *Smith v. Peoria Co.*, 59 Ill. 412; *People v. Vilas*, 36 N. Y. 459-465; *Mayor v. Sibberns*, 3 Abb. App. Cas. 266; *Bartlett v. The Governor*, 2 Bibb, 586; *Colter v. Morgan*, 12 B. Mon. 278; *Com. v. Gabbert*, 5 Bush, 438; *Marney v. State*, 13 Mo. 7; *King v. Nicholas*, 16 Ohio St. 80; *U. S. v. Gaussen*, 2 Woods, 92.

The decision last cited was affirmed on another ground, and the supreme court has never decided this point, but the remarks of *Strong, J.*, show it to be his opinion that the bond will not be discharged unless duties of a different nature are imposed, or (which is the English way of putting it) the

duties of the office are so increased that the court can fairly call it a different office from that originally undertaken. *U. S. v. Gaussen*, 97 U. S. 584. Strong remarks in support of the general rule as above laid down will be found in the opinions of *Clifford, J.*, in *U. S. v. Powell*, 14 Wall. 493, of *Hunt, J.*, now of the supreme court, in *Beople v. Vilas*, 36 N. Y. 465, where he mentions collectors of customs and of internal revenue, and of *Swayne, J.*, in *U. S. v. Singer*, 15 Wall, 111.

I have found very few cases in the United States which can be cited in opposition to this rule. I have not fully examined the law of England, but will mention an early case because it is very often cited in this country, and has been misunderstood. *Bartlett v. Att'y Gen.*, Parker, 277, was decided in the exchequer in 1709, and is reported briefly but with much precision, as follows: "Clarke, in 1691, was made collector of the customs in the port of Boston; Bartlett and others were security for him. In 1698, (10 William III.,) the duties were granted upon coal, etc., which by the statute were to be under the management of the commissioners of the customs, and certain clauses for that purpose in the act. *The commissioners gave Clarke a deputation for that purpose and took security.* Clarke afterwards died; the customs were paid; but on this new coal duty £1,000 remained unpaid, upon which the bond was put in suit against Bartlett, the widow and executrix of Bartlett, the security, and she brought her bill, and the question was whether the bond in which Bartlett became security extended to this new duty on coals. After adjournment the Barons delivered their opinions *seriatim*, and unanimously held that the bond did not extend to the new duty on coals;" and they granted a perpetual stay of the action.

I have put one line of the report in Italics in order to point out what I understand to be the actual legal result. The new duty does not appear to have been considered a customs duty at all, though put under the management of the commissioners of customs. The statute, which I have examined, (9 and 10 William III., c. 13,) leaves no doubt of this in my mind, and it seems that the commissioners took a new bond under

it. The case, therefore, is one of a new office bestowed upon the same person who already held one; and, of course, the old bond does not apply to the new office, and does remain good for its own purposes. *Skillett v. Fletcher*, L. R. 1 C. P. 217, and 2 C. P. 469.

Another case of the highest authority is *United States v. Kirkpatrick*, 9 Wheat. 720. In that case a collector appointed during a recess of the senate to hold until the end of the next session, and no longer, was nominated to and confirmed by the senate at its next session, and received a new commission, but gave no new bond. The decision was that the old bond ended with the expiration of the old commission. But Mr. Justice Story comments on the great change of duties which had been imposed upon the officer by some later statutes, and says that the new liabilities would not have been within the condition of the bond had it remained in force. The case, in that respect, may well fall within the qualifications of the rule which I will now proceed to consider.

The rule is usually said to be thus qualified: that it shall not apply if the office has been wholly changed, or if the new duties, however unimportant in themselves, are not germane to those of the original appointment. These qualifications lead to some uncertainty, because courts may differ as to what changes are in kind or degree within the limitation.

I have found but two cases in which it has been held that the new duties were so different from the old that they could not be supposed to be within the contemplation of the parties. In *United States v. Singer*, 15 Wall. 111, a distiller had given bond to comply with the provisions of the law in relation to the duties and business of distillers, and pay all penalties incurred or fines imposed upon them for a violation of any of the said provisions. These provisions were numerous; requiring notices, returns, keeping books, paying taxes, etc., etc. When the bond was given the law was that the store-keepers, who were officers of the United States appointed to duty at the warehouses of distillers, should be paid by the United States; afterwards a joint resolution was passed in congress requiring the distillers to reimburse to the United

States the expenses and salary of store-keepers. The action upon the bond alleged as a breach the non-payment of certain taxes, and the failure to reimburse these expenses which had been paid by the United States before the passage of the joint resolution. The point that the bond was entirely discharged does not appear to have been taken, and the court reversed the ruling which had decided that no taxes were due, and, of course, upheld the bond *pro tanto*. As to the salary of a store-keeper, they held that the joint resolution did not apply to salaries paid before its passage; but that, if it did, the parties could not be supposed to have had in mind that the United States would pass a law throwing the expenses of their own officers upon the distiller.

In *People v. Tompkins*, 74 Ill. 482, A. was appointed chief inspector of grain in a certain city and gave bond. The law imposed important duties upon the inspector, and his liabilities were correspondingly great; but they looked to a careful and impartial inspection of grain, and not to any direct pecuniary responsibility. The duties of chief inspector might be regulated to a certain extent by certain commissioners, and after the bond was given A. was duly required by the commissioners to receive and account for the fees of inspection. The court held that while such a designation of duty was within the power of the commissioners, the sureties could have had no reason to expect that a responsibility of that nature would be imposed upon their principal.

In this case the obligation imposed upon McCartney to pay store-keepers in addition to his own salary and commissions, and the payment of assessors, assistant assessors, clerks, etc., appears to me to be *ejusdem generis* with those duties which the obligors knew he was to perform, and, therefore, to bring this case within the general rule.

Notwithstanding general rules every contract must be interpreted by its own words; but I do not find anything in this bond to take it out of the rule. The recital that McCartney had been designated as disbursing agent to pay the expenses incident to the internal revenue laws, when construed by the light of the law prevailing in the United States, refers to fu-

ture as well as present laws and expenses, so far as they are germane to the office; and, moreover, the condition is general to account as such disbursing agent, which is an undertaking to account as such public agents are by law required to account.

The defendants took no exceptions to the rulings of the district judge, but it was necessary to consider the points which I have decided, not only because it comes within the exceptions of the plaintiff, but because, if upon the admitted facts the bond was void, the judge was right in ordering a verdict for the defendants.

I do not find it necessary to decide whether any case is made by the declaration, because that may be amended; nor whether a part of the transcripts from the treasury department was not properly verified, because, before the next trial, a further verification may be obtained. So far, however, as the defendants' objection is that the collector was only bound to pay the expenses of his district at some time, before or after he had left office, and that the bond does not require him to pay anything to the United States under any circumstances, I ought to say that, in my opinion, the condition to account and pay over obliges him to pay the expenses while he holds office, and that, when he retires, he must pay the balance in his hands to his successor, or to some other officer duly authorized by the United States to receive it. Upon the broad ground which I have been considering the order must be for a *venire de novo*.

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GILBERT v. QUIMBY and others.

(Circuit Court, S. D. New York. January 20, 1880.)

**BANKRUPTCY—ATTACHMENT OF DIVIDEND—EQUITABLE RELIEF.**—A bill in equity will not lie in favor of a partnership creditor, to restrain the application of a dividend in the hands of an assignee in bankruptcy to the debt of an individual creditor, where both of the creditors have attached such dividend under process issued by a state court.

WHEELER, J. One Alden J. Adams and the defendant Union Adams were partners, and the defendant Lynch had a partnership debt against them. The interest of Alden Adams in the partnership assets was transferred to Union Adams, for which the latter became indebted to the former in the sum of \$6,000. Union Adams became insolvent, and assigned his property to the defendant Woolton, for the benefit of his creditors. Afterwards he was adjudged a bankrupt and the defendant Mitchell became his assignee in bankruptcy, and as such recovered the property. Lynch assigned his debt against Union Adams to the defendant Quimby, and both the latter and Alden Adams proved their claims against the estate of Union Adams in bankruptcy. Quimby has received a dividend upon his claim, and Union Adams has received a discharge. A dividend to Alden Adams upon his claim has been ordered and is still in the hands of the assignee.

Quimby commenced suit in his own name, under the laws of New York, in the courts of New York, against Alden Adams, recovered judgment therein, took out execution on the judgment and placed it in the hands of the defendant Carpenter, who is sheriff of Westchester county, and of the defendant Connor, sheriff of New York county, who have claimed to attach thereon the dividend of Alden Adams in the hands of Mitchell, assignee. The orator has proceeded in the same manner with his debt against Alden Adams, but the attachment in his case is subsequent to Quimby's. He claims that he is an individual creditor of Alden Adams, and that as such he is entitled to have his debt satisfied out of the individual property of the debtor in preference to Quimby, who is a partnership creditor, and has brought this bill to have application of the dividend to Quimby's debt restrained, and application of it to his debt decreed. The defendant Quimby insists that the dividend represents Alden Adams' share in the partnership assets, as to which the orator is not entitled to any priority; that he is entitled to precedence because of the priority of his attachment; and that the fund is not so before this court that it



can be marshalled here. The orator urges against the defendant's claim of priority of attachment that no attachment of the dividend in the hands of the assignee, on process out of the state court, could be made.

That the dividend was not attachable on process from the state courts would seem to be quite clear. While in the hands of the assignee it would be a part of the estate of the bankrupt in the custody of the court. It would not be held the property of the debtor, but would only be property that would become his when he should get it. He could not maintain any suit against the assignee for it, nor obtain it by any legal process other than by application to the district court having control of the fund as a party to the proceedings in that court. Money in the hands of a disbursing officer of the United States, due to a private person, cannot be attached on process against such person out of a state court, because the money will not be his, but will remain the property of the United States until it is paid to him. *Buchanan v. Alexander*, 4 How. 20. Neither can any fund be so attached that it is so situated that the debtor in the process is not entitled to sue for and recover it. *McLaughlin v. Swann*, 18 How. 217; *Gassett v. Grout*, 4 Met. 486-488. These reasons are applicable to a dividend in the hands of an assignee. *Colby v. Coates*, 6 Cush. 558; *Cappel v. Smith*, 47 R. 312, and *Grant v. Harding*, in note; *In re Bridgman*, 2 Nat. Bank Reg. 252.

The order of the district court would be that the dividend be paid to Alden Adams, and there would not appear to be any tenable ground on which any other court or officer could order it paid to any one else, or order that payment to another should be payment to him, or answer the effect of the order. And if the attachments were both wholly inoperative, as the orator claims and it seems they are, there is no ground left for making the plaintiff in the first attachment or the attaching officers parties here. Payment of the dividend to them by the assignee on such process would be no more than payment to them or any one else without process, and he would remain subject to the order to pay to Alden Adams the same

as before, and no interposition through this court would make his liability any greater or different.

And if the process of the state court would have any validity or effect in attaching the dividend, there is another reason why they should not be proceeded against in this manner here. The U. S. Rev. St. § 720, provide that writs of injunction shall not be granted by any United States courts to restrain proceedings of a state court, except where authorized by law relating to proceedings in bankruptcy. The *express* authority to restrain such proceedings in the bankrupt law extends only to suits against the bankrupt himself. U. S. Rev. St. § 5106. The implied authority would extend only to proceedings to realize the assets and bring them into the custody of the bankruptcy court. *Id.* § 4972.

This dividend is a part of the bankrupt estate of Union Adams, but this suit has no reference to it as such, but only as a part of the property of Alden Adams. *Peck v. Jennes*, 7 How. 612. It is argued for the orator that the jurisdiction given to the circuit court in bankruptcy matters warrants proceeding in this manner against this fund. This jurisdiction is given by sections 4979 and 4986, Rev. St. The provisions of the former section evidently relate to actions for the recovery, defence or ascertainment of the estate of the bankrupt for his creditors. *Lathrop v. Drake*, 91 U. S. 516; *Burbank v. Bigelow*, 92 U. S. 179; and those of the latter section to the review of decisions upon questions that have arisen in the course of the proceedings in the district court. *In re Alexander*, 3 Nat. Bank Reg. 6, and 8 Am. Law Reg. 423; *Morgan v. Thornhill*, 11 Wall. 65. This is not a case of either class, as is apparent from the reasons before stated, and this court has not any fund as such before it, or in custody, as it would have if it were administering upon the bankrupt estate, nor on account of any other proceedings of its own, as the court in *Burbank v. Bigelow* had, by the appointment of a receiver.

Still the parties are residents of different states, and the amount in controversy is more than \$500, so that this court has jurisdiction of the parties and of the cause of action, if

there is any ground of relief. It is doubtless true that, by the law of New York, where this partnership was and these transactions took place, individual creditors have a preference as to individual property over firm creditors, (3 Kent Comm. 64; *Murray v. Murray*, 5 John. Ch. 60,) although the law may be different in some other places. *Bardwell v. Perry*, 19 Vt. 292. But whether the orator has such paramount lien or not, does not seem to be very material to the decision here, for the defendants are not asserting any lien that the orator is bound to take notice of, or that can affect his rights in any degree, according to his own argument. If the defendants were about to dispose of individual property by creating a lien upon it, which would be good but for the orator's paramount equity, there would be occasion for him to assert his equity. Till then he has no ground to complain.

The assignee holding the dividend ordered to be paid to Alden Adams, and the creditors of Alden, are both before the court, and if there were grounds for it the dividend should be taken to pay his debt. He is not a party to this suit, but should be, if his property and rights are to be adjudicated upon in it. If that lack could be supplied, then the question would remain whether a court of equity could grant the relief. A bill for the purpose of appropriating the dividend to the debt would be in effect an action at law, (*Wilson v. Koontz*, 7 Cranch, 202;) and if the dividend could not be reached at law, there is no good reason apparent why it could be by such a bill. There is no relief about the dividend which a court of equity could furnish to any party that a court of law could not. The fund is subject to the order of the district court, and neither could interfere with that. There must be some ground for equitable relief in reaching the property of the debtor before a bill will lie in such a case. *Public Works v. Columbia College*, 17 Wall. 521. There does not appear to be any ground on which the bill can be sustained.

Let there be a decree dismissing the bill of complaint, with costs to such defendants as have answered the bill.

KEYSTONE BRIDGE COMPANY *v.* BRITTON.*(Circuit Court, S. D. New York. January 20, 1880.)*

**CONTRACT—RECEIPT—EVIDENCE.**—Where, upon sufficient consideration, a statement is written across the face of a note by the party signing such statement, to the effect that funds have been placed in his hands, as trustee, for the payment of such note at maturity, the party so signing becomes personally liable for the payment of the note, although evidence was admissible to prove that the payee of the note knew that such signer actually had no such funds in his possession at the time he signed the statement, nor had subsequently received sufficient to pay the note in full at its maturity.

*Man & Parsons*, for plaintiff.

*Tracy, Olmstead & Tracy*, for defendant.

WHEELER, J. The orator built a bridge across the Mississippi river, at St. Louis, for the Illinois & St. Louis Bridge Company, in which the defendant was interested, and of which he was treasurer. After the bridge was completed, but while it was still in the possession of the orator, the Illinois & St. Louis Bridge Company executed its promissory note for \$51,510.95, payable in ten months after date, to its own order, at the Bank of Commerce, in New York. Although the defendant at that time had not funds in his hands, as trustee or otherwise, for the payment of the note, which the orator knew, it was arranged between him and the Illinois & St. Louis Bridge Company that he should receive the tolls of the bridge for that purpose, which they thought would be sufficient to pay it, and a statement written across the face of the note in these words, "Funds for the payment of this note at maturity have been placed in my hands, as trustee," was signed by the defendant to induce the orator to accept the note and deliver up the bridge. The note was indorsed by the Illinois & St. Louis Bridge Company, and delivered to the orator. The note was equal in amount to the balance due the orator for building the bridge. The orator took the note and delivered up the bridge, and the defendant received the tolls of the bridge. All tolls received by the defendant have been applied to the payment of the note, but they were not

sufficient to pay it, and there is a large balance still due upon it. This suit is brought to compel payment.

The defendant claims that, in view of the circumstances, the true meaning of the statement signed by the defendant is that some funds for the payment of the note had been placed in his hands, and that the extent of his obligation thereby assumed was that he should apply to its payment what funds he so had, and that, if the statement means more than that, the undertaking beyond that is without consideration. The orator insists that the statement signifies that funds sufficient for the payment of the note are in his hands, and implies an undertaking that he will apply them to its payment; all amounting to an obligation to have funds and pay the note at maturity, which could be discharged only by payment of the note, and that evidence of a lack of funds placed in his hands is contrary to his agreement and not admissible.

The entire want of consideration for an agreement may always, between the original parties to it, be shown, for it would not add to or vary a contract, but show that there was none. As this note was given upon a pre-existing debt of the Illinois & St. Louis Bridge Company, if by the law where made it would not discharge or affect the debt, proof of that fact might show a want of consideration as to the defendant, unless there was a new consideration. The proof, however, shows the delivering up of the bridge on which the debt was due, and this was an ample consideration, in which the defendant participated.

There are many cases in which persons who are not parties to notes as written, but become so by putting their names upon them in blank, indicating authority to the holder to fill the blank, have been permitted to show the intention of the parties; and where persons who have become parties by signing an undertaking written out in full are permitted to show the circumstances under which it was done to place the transaction in its true light. *Good v. Martin*, 95 U. S. 90. This case is not one of the former class, for it is apparent that the defendant wrote what he intended to sign, and left no blank to be filled. Under the rule as to the latter class the evidence:

as to the circumstances is proper to be considered, to enable the court to see the transaction as the parties saw it. When this evidence is viewed the interpretation of the defendant's undertaking is not doubtful.

The orator would not rely upon the tolls, as they should come to the defendant's hands, for the payment of the note, and the defendant executed this instrument. Funds for the payment of the note must be taken as signifying funds for the payment of the whole note. The defendant agreed that he had the funds for that payment, which was an agreement in effect that he might be treated as if he had, whether he had or not. He became situated like a receptor of property, as if it was attached when there was none, or a person who has acknowledged the receipt and holding of property for some purpose otherwise, when none has been received, each of whom is held bound by the terms of the receipt or acknowledgement. *Harmon v. Anderson*, 2 Camp. 243; *Stannard v. Dunkin*, Id. 344; *Lyman v. Lyman*, 11 Mass. 317; *Chapman v. Searle*, 3 Pick. 38. If he had funds in his hands for the payment of the note at maturity, a court of equity would charge him with the payment of the amount of the note. He agreed that he had such funds, the orator took the note on faith in that agreement, and he must stand now as if he had them charged with payment of the note. No account of the funds is necessary to be taken, for he is to be charged with the amount due on the note, which can apparently be ascertained by mere computation.

Decree for plaintiff.

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### SAXONVILLE MILLS v. RUSSELL.

(*Circuit Court, D. Massachusetts.* January 7, 1880.)

REVENUE—DUTY ON WOOL—PRESUMPTION AS TO "INVOICE VALUE."—It will be presumed, in the absence of testimony, that where an importation of wool was appraised at its "invoice value," such appraisment did not include the charges upon the wool at the port of exportation, when the invoice contained the amount and cost of the wool separate from such charges.

SAME—SAME—APPRAISAL.—An actual appraisement by the appraiser is conclusive as to the value of such importation, in the absence of an appeal to the merchant appraisers, and the collector is therefore required to assess the duty upon such valuation.

SAME—SAME—INVOICE VALUE.—Unwashed Cordova wool is within the provisions of the act of March 3, 1865, (13 St. at Large, 493, § 7,) which provides that the duty assessed upon certain imports "shall not be assessed upon an amount less than the invoice or entered value" of such imports.

CLARK, J. The act of June 30, 1864, entitled "An act to increase duties on imports and for other purposes," imposed a duty on unmanufactured wool, according to its grade or value, at the port whence exported to the United States, exclusive of charges in such port. If of the value of "twelve cents or less, three cents per pound; exceeding twelve cents, and not exceeding twenty-four cents per pound, six cents per pound; exceeding twenty-four cents per pound, and not exceeding thirty-two cents, ten cents per pound, and in addition thereto ten per centum ad valorem; exceeding thirty-two cents per pound, twelve cents per pound, and in addition thereto ten per centum ad valorem." This act also contained a provision for the appraisal of goods, wares and merchandise in accordance with the provisions of existing laws, and a further provision "*that the duty shall not be assessed upon an amount less than the invoice or entered value, any law of congress to the contrary notwithstanding.*" 13 St. at Large, 217, § 7.

The act of March 3, 1865, entitled "An act amendatory of certain acts imposing duties upon foreign importations," did not change the grade or rate per pound at which wool was to be taken, but provided "that in all cases where there is or shall be imposed any *ad valorem* rate of duty on any goods, wares or merchandise imported into the United States, and in all cases where the duty imposed by law shall be regulated by, or directed to be estimated or based upon, the value of the square yard, or of any specified quantity or parcel of such goods, wares or merchandise, it shall be the duty of the collector, within whose district the same shall be imported or entered, to cause the actual value or wholesale price thereof, at the period of exportation to the United States, in the prin-

incipal markets of the country, from which the same shall have been imported into the United States, *to be appraised, and such appraised value shall be considered the value upon which duty shall be assessed.*" *"Provided, the duty shall not be assessed upon an amount less than the invoice or entered value, any act of Congress to the contrary notwithstanding."* 13 St. at Large, 493, § 7.

The act of July 23, 1866, entitled "An act to protect the revenue, and for other purposes," while altering the rates of duty on many other articles, did not change the rate of duty on wool further or otherwise than it provided "that, in determining the dutiable value of merchandise hereafter imported, there shall be added to the cost, or to the actual wholesale price or general market value, at the time of exportation, in the principal markets of the country from whence the same shall have been imported into the United States, the cost of transportation, shipment and transshipment, with all the expenses included from the place of growth, production, or manufacture, whether by land or water, to the vessel in which shipment is made to the United States; the value of the sack, box, or covering of any kind in which such goods are contained; commission at the usual rates, but in no case less than two cents and a half per centum; brokerage, export duty, and all other actual or usual charges for putting up, preparing and packing for transportation and shipment." All charges of a general nature to be distributed pro rata among all parts of the invoice. 14 St. at Large, 330, § 9. But *"the duty in no case to be assessed upon an amount less than the invoice or entered value."*

From these provisions of the act of 1866 "long combing or carpet wools, costing 12 cents or less per pound, unless the charges so added should carry the cost above 12 cents per pound, in which case one cent per pound should be added," were expressly excluded, showing quite clearly that other kinds of manufactured wools were included. *Expressio unius est exclusio alterius.*

This act of 1866 did not repeal the act of 1865 only so far as it was inconsistent therewith, and it did not change or



alter the duty of the appraiser or collector in regard to imported goods, as provided and expressed in section 7 of the act of 1865, further than to add costs and charges of various kinds to the wholesale price of the goods in the principal markets of the country from which the same shall have been imported into the United States.

The act of March 2, 1867, (14 St. at Large, 559,) entitled "An act to provide increased revenue from imported wool, and for other purposes," provided for a classification of wools into "clothing wool," "combing wools," "and carpet and other similar wools." These classes were again divided, each into two grades. The class to which any imported wool belonged was to be determined by samples prepared under the direction of the secretary of the treasury and deposited in the custom houses and elsewhere; the grade of the wool, in its particular class, by the value at the last port or place whence exported to the United States, excluding charges in such port. This act contained no words repealing any former act, except the expression "in lieu of the duties now imposed by law" there shall be levied, etc., certain other rates of duty on various articles, among which was wool, as above stated. The act of June 6, 1872, (17 St. at Large, 230,) reduced these rates of duty on wool 10 per centum.

With the law as provided and enacted in these several statutes, the plaintiff, in August, 1873, imported into Boston from Rosario, by the bark "Velox," 324 bales of unwashed Cordova wool, and entered it in bond. The entry was accompanied by the invoice of the wool, showing the cost of the wool and the charges thereon, separately. The wool was purchased March 2, 1873, and cost more than 12 cents per pound; it was shipped on the fifth of June following. On the tenth of the same June Thomas B. Wood, acting consul of the United States at Rosario, made the following certificate on the invoice:

"U. S. CONSULATE, June 10, 1873.

"I, Thomas B. Wood, acting U. S. consul for Rosario, do hereby certify, after investigation, that the market value of unwashed Cordova wool at this place, at the date of the

shipment of the annexed invoice, was 32 to 32½ Bolivia reals, equivalent to 24 38-100 to 24 76-100 reals fuerte, per arroba, net weight.

"Given under my hand and seal this day.

"THOMAS B. WOOD,

"Acting U. S. Consul."

—Which, being reduced to United States weight and currency, shows a value at Rosario less than 12 cents per pound.

When this entry came before the appraiser, for examination and appraisal, he appraised the wool at the invoice price—that is, more than 12 cents per pound. With this appraisalment the plaintiff was dissatisfied, claiming, as appears by his protest, that the wool was of value less than 12 cents per pound at the last port whence exported to the United States, at the date of exportation; that "the acting United States consul so certified in the invoice." But he claimed no appeal therefrom to the merchant appraisers. The defendant, collector of customs, assessed and exacted of the plaintiff a duty of six cents per pound, less 10 per centum. The plaintiff claimed that a duty of three cents per pound, less 10 per centum, should have been laid upon the wool, and paid the extra three cents under protest.

The question then is, was the defendant right in exacting a duty of six cents per pound, less 10 per centum, upon the wool, instead of three cents per pound, less 10 per centum?

It cannot be questioned that it was the duty of the collector, when this wool was entered, to cause it to be appraised. He was required to do so by the act of March 3, 1865, § 7, (13 St. at Large 493,) and he could not otherwise determine the duty to be levied per pound on the wool, which was to be determined whether three or six cents, by its value. The appraiser appraised the wool as required, and fixed its value at the "invoice value." It was suggested in the argument that the "invoice value" might have included charges upon the wool at the port of exportation, as well as the price paid or value of the wool. But the presumption is, in the absence of any testimony on the point, as the invoice contained the amount and cost of the wool separate from the charges, that

the appraiser did not include the charges in the "invoice value" of the wool, but excluded them, as required by law.

With this appraisal the plaintiff was dissatisfied, and he complained, as appears by his protest, that the value of the wool was less than 12 cents per pound, as certified by the United States consul on the invoice, and that the appraiser has not appraised, determined and reported the true market value of the wool at the date and place of exportation. But he claimed no appeal to the merchant appraisers to correct the appraisal. The value of the wool at the last port whence exported to the United States, excluding charges in such port, was a matter of fact, and upon it the appraisal was conclusive, if no appeal was taken. The act of March 3, 1865, § 7, (13 St. at Large, 493,) required the collector to assess the duty upon it. "*Such appraised value shall be considered the value upon which duty shall be assessed,*" is the language of the statute. *Iasigi v. Collector*, 1 Wall. 375; *Tappan v. United States*, 2 Mason, 393-404; *Rankin v. Hoyt*, 4 How. 327.

In *Bartlett v. Kane*, 16 How. 263-272, the court say: "The appraisers are appointed 'with powers, by all reasonable ways and means, to ascertain, estimate and appraise the true and actual market value and wholesale price' of the importation. The exercise of these powers involves knowledge, judgment and discretion, and in the event that the result should prove unsatisfactory a mode of correction is provided by the act. It is a general principle that when power or jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter." "The interposition of the courts in the appraisement of importations would involve the collection of the revenue in inextricable confusion and embarrassment."

In *Rankin v. Hoyt*, 4 How. 327, it was held the duty of the collector to be guided by the appraisement, and a subsequent verdict of a jury finding that the value of the wool was under eight cents per pound cannot be considered as rendering his acts illegal.

So in this case, the subsequent statement in the agreed case that wool fell at Rosario between the time of the purchase of the wool and the time of exportation, and that at the time and place of shipment the market value, excluding charges in such port, was less than twelve cents per pound, cannot affect the imposition of the duty by the collector in accordance with the appraisal. See, also, *Belcher v. Linn*, 24 How. 508; *Schmaire v. Maxwell*. 3 Bl. C. C. 408.

The plaintiff contends in this case that the appraisal was not legal or sufficient; nevertheless, it was an actual appraisement, free from fraud, and in the exercise of the appraiser's best judgment and discretion, and the remedy was by an appeal. These considerations dispose of the "first," "second," "third" and "fifth" grounds of the plaintiff's protest and of the case. But there remains the "fourth" ground of protest, and, as the case has been argued at length on that ground by the counsel for the plaintiff, it may be well that the court should state its conclusions upon that also.

The "fourth" ground of protest by the plaintiff is this: "The proviso in section 7 of the act of March 3, 1865, that the duty shall not be assessed upon an amount less than the invoice or entered value, does not apply to this import. The act of March 2, 1867, in express terms repeals all prior laws imposing duty on wools, and makes new classifications based on blood of sheep, and the rate of duty is fixed by the value at the last port of exportation, and exclusive of charges in such port." Now it is quite true that the act of March 2, 1867, above referred to, did provide that "in lieu of the duties now imposed by law on the articles mentioned and embraced in this section (§ 1 of the act) there shall be levied, collected and paid on all unmanufactured wool, hair of the alpaca goat and other like animals imported from foreign countries, the duties hereinafter provided." But it should be kept in mind that the proviso of section 7 of the act of 1865, *that the duty shall not be assessed upon an amount less than the invoice or entered value*, did not refer specifically to importations of wool, nor was it enacted in reference thereto alone, but it applied to "all cases where the duty imposed by law shall be regu-

lated by, or directed to be estimated or based upon, the value of the square yard, or any specified quantity or parcel of such goods, wares or merchandise," and is not repealed by any provision of the act of 1867. Indeed, it would seem to be directly applicable to the provision of the act of 1867, in regard to wool, in this, that the rate of duty in each of the grades of wool in the several classes is determined by the value of the wool at the time and place of exportation, exclusive of the charges of the port. "But," then adds the proviso, "the duty shall not be assessed upon an amount less than the invoice or entered value, any act of congress to the contrary notwithstanding." This view of the statutes of 1865 and 1867 is much strengthened by an examination of the act of June 30, 1864, entitled "An act to increase duties on imports, and for other purposes." The fourth section of the act (13 St. at Large, 206) imposes a duty on wool, of the description of the wool in controversy, almost precisely the same as the duty in this case, to-wit: "On all wool unmanufactured, and all hair of the alpaca goat, and other like animals, *the value whereof at the last port or place from whence exported to the United States, exclusive of charges in such ports, shall be: 12 cents or less per pound, three cents per pound; exceeding 12 cents, and not exceeding 24 cents per pound, six cents per pound.*" Then, in the twenty-third section, providing for the appraisement of goods, wares and merchandise, follows the proviso "that the duty shall not be assessed upon an amount less than the invoice or entered value, any law of congress to the contrary notwithstanding."

The case of *Kimball v. The Collector*, 10 Wall. 436, is in point. That case, in some of its features, closely resembles the one under consideration. The question was whether the value of the wool was more than 20 cents per pound, or 20 cents or less. If valued at more than 20 cents per pound, the wool was liable to duty; if at 20 cents per pound, or less, it was free of duty. The invoice value of the wool when bought was more than 20 cents per pound, but before it was shipped the price of wool had fallen, and at the date of shipment it was less than 20 cents per pound. The court held the invoice

value must govern, and that the appraisers could not go below it. If the invoice value was the lowest value at which the goods could be appraised in deciding whether they were liable to duty or not, it is difficult to see why the invoice value is not to be held to be the lowest value at which the merchandise can be appraised, in determining whether the duty should be six cents or three cents; the rate of duty per pound depending on the value of the merchandise per pound.

It is objected that in the case of *Kimball v. The Collector* the duty was *ad valorem*, and in the case under consideration specific. But the amount of the specific duty depended on the value of the goods, just as, in the case of *Kimball v. The Collector*, it depended on the value of the goods whether the duty should be 24 per cent. *ad valorem* or nothing. Further, the act of March 1, 1823, § 23, (3 St. at Large, 737,) "that when any goods, wares or merchandise shall be admitted to an entry upon invoice, the collector of the port in which the same are entered shall certify the same under his official seal, and no other evidence of the value of such goods, wares or merchandise shall be admitted on the part of the owner or owners thereof in any court of the United States, except in corroboration of such entry," confirms the opinion of the court that judgment should be for the defendant on all the grounds of protest.

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**EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES  
v. CHARLES G. PATTERSON and others.**

(*Circuit Court, D. Massachusetts* February 7, 1880.)

**BILL IN EQUITY—INFANTS.**—Infants are necessary parties to a bill in equity to set aside a policy of insurance, when they have a contingent interest in such policy.

**SAME—MULTIFARIOUSNESS.**—The joinder of a prayer in such bill to restrain an action at law for the recovery of back premiums already paid does not render the bill multifarious.

SAME—DEMURRER *Ore Tenus*—OATH OF INFANTS TO ANSWER.—A demurrer *ore tenus* must be co-extensive with the bill, and will not prevail where the demurrer is taken upon the ground that the bill prays for an answer under oath by infant defendants.

NELSON, J. The infant defendants, Kate Kirby Patterson and Edwin Crosswell Patterson, by their guardian *ad litem*, demur to the plaintiff's bill, and assign as causes of demurrer: *First*, that they have no interest in the matters complained of in the bill; and, *second*, multifariousness. The plaintiff is a New York corporation, and the policy of insurance was issued and is payable there. The insurance money, by the terms of the policy, is payable to the children at the decease of Charles G. Patterson, the father, if Fannie E. Patterson, the mother, is not then living. This clearly gives the children a contingent interest in the policy, and they are, therefore, proper and necessary parties to a bill in equity to set aside the policy for any cause. *Eadie v. Slimmon*, 26 N. Y. 9; *Barry v. Equit. L. Ass. Soc.* 59 N. Y. 587; *Knickerbocker Ins. Co. v. Weitz*, 99 Mass. 157.

The joining in the bill a prayer for an injunction to restrain Charles G. Patterson, one of the defendants, from further prosecuting a suit at law in this court, to recover back the premiums already paid, is not such a distinct and independent matter as to render the bill multifarious.

The guardian *ad litem* assigns another cause of demurrer *ore tenus*, that the bill prays for an answer, under oath, by the infant defendants. There are two reasons why this demurrer cannot prevail. The first is that a demurrer *ore tenus* must be co-extensive with the demurrer upon the record. 1 Dan. Ch. Prac. 589; Story's Eq. Plead. § 464. The demurrer on the record here is to the whole bill, while the demurrer *ore tenus* is to the prayer only. The second reason is that an infant's answer is by his guardian, and should be upon the oath of the guardian, though he is required to swear only to his belief in the truth of the infant's defence. 1 Dan. Ch. Prac. 753; Story's Eq. Plead. § 871.

The entry must be: Demurrer overruled.

## FARWELL v. BROWN.

(Circuit Court, W. D. Wisconsin. February 13, 1880.)

**ATTACHMENT—PREFERENCE OF CREDITORS.**—The preference of a *bona fide* creditor does not authorize the issuing of an attachment upon the ground that the defendant has disposed of his property with the intent of defrauding his creditors.

BUNN, J. This case comes up on a traverse of the plaintiff's affidavit, upon which an attachment was issued.

The affidavit states that deponent has good reason to believe that the said defendant has assigned, conveyed, disposed of or cancelled his property with intent to defraud his creditors; and that said defendant is about to abscond from the state of Wisconsin, to the injury of his creditors. There was no proof offered under the charge of absconding from the state, and the sole issue is whether the defendant had conveyed or disposed of his property with intent to defraud his creditors.

This is clearly the issue, and not simply whether the deponent, at the time of the making of the affidavit, had reason to believe the defendant had fraudulently conveyed or disposed of his property with such intent. The deponent's reason to believe was a material fact for the purpose of suing out the writ, but counts for nothing when the facts constituting the ground for sustaining the attachment are denied. Here the parties come to closer quarters, and use facts, instead of reasons for belief, for their weapons.

The defendant had in fact conveyed and disposed of the greater part of his property, consisting of a stock of goods, and some notes and store accounts, to his brother, P. E. Brown, and the issue to be tried is whether the sale was made with the intent to defraud the defendant's creditors. If it was, the attachment must be sustained, otherwise not.

The defendant, previous to August 12, 1879, had, since the fall of 1872, been a merchant at Belmont, Wisconsin. In July, 1878, his health failing, he sent for his brother, P. E. Brown, to come and take charge of the store and carry on the business for him. Defendant remained sick in Chicago some seven weeks, and after coming home, not getting any better,



went to the Hot Springs in Arkansas for his health, in April, 1879, and remained until August of same year, during which time P. E. Brown carried on the business for him. Defendant testifies that during his sickness his expenses and those of his family were very large, and that when he returned from Arkansas he found he could not meet all of his payments. On the twelfth of August, 1879, he took an inventory and sold out his stock of goods, \$200 worth of notes and \$1,700 of accounts to his brother. The stock inventoried at cost prices \$4,581.95, from which was discounted 25 per cent., making the price at which the goods were sold \$3,436.46, which, with the notes and accounts, made \$5,336.46.

The Browns both testify that at the time of this sale the defendant was indebted to his brother in the sum of \$2,680.92; that \$2,080.92 of this was for money advanced by P. E. Brown to defendant to pay claims for goods purchased by defendant in his business, and \$600 was for 10 months' work in the store at \$60 per month.

Defendant also testified, and in this he is corroborated by his brother, and I see no reason to doubt the fact, that he was indebted to his own wife in the sum of \$1,307.45, for money he had had from the proceeds of her separate estate, and which it was the understanding that he should pay back. A farm at Warren, Illinois, had come to her from her uncle's estate, and which she had sold for \$4,700. Her husband received the two last payments, amounting to \$1,307.45, and put into his business with the above understanding. He had also received the previous payments and put them in his business, and had never repaid any part of it.

The agreement on the sale of the goods, as testified to by the two Browns, was that P. E. Brown should cancel the defendant's indebtedness of \$2,680.92 to him, which he did; pay defendant's wife the said indebtedness of \$1,307.45, for which he gave his note at the time of the sale and has since partly paid, I believe all but about \$300; and assume a bank indebtedness of \$877.94, due by defendant to Northrup & Co., bankers at Belmont, for which he also gave his note, which

he has since nearly paid up; and to balance the account gave defendant his note for \$470.15, which he has also paid in full.

P. E. Brown took possession on the sale, and remained in possession up to the time the goods were attached, about the last of August, 1879. The evidence all tends to show that the consideration paid for the property was adequate; and the fact that the stock was sold at 25 per cent. below the invoice price is no evidence to the contrary.

R. H. and P. E. Brown both swear it was all the stock was worth; that P. E. Brown afterwards offered and tried to resell it for what he paid, but could not, and that it was inventoried in the attachment proceedings at \$3,000. The plaintiff has not even undertaken to prove that the goods were worth more than P. E. Brown paid for them, but relies in good part upon the testimony of one Joseph Brown and A. E. Campbell, to show actual intent on the part of the defendant to defraud. Campbell was the attorney of Farwell & Co., and went to Belmont to secure this claim soon after the sale to P. E. Brown, about the last of August. He found the defendant in the store, and had a conversation with him; saw him selling goods and giving instructions to clerks, or supposed he did. Defendant told him he could not pay, and that he had sold out to his brother. He says defendant refused to give him any statement of his affairs; that he refused to let him see his books, or to make any explanation or give him any satisfaction. All of which the defendant denies, and says he told him about his indebtedness, and all about the sale to his brother and the consideration, and that he had a dispute about the statement defendant had given plaintiff as to his financial condition, and that Campbell threatened him with criminal prosecution in Chicago, and talked to him in a very ugly way about it, and that while he was so talking he refused to give him any explanation, but afterwards he talked to him about his sickness and the heavy expenses he had been to, and told him about the sale and the consideration for it, and that they took dinner together and were more friendly.

Joseph Brown was an agent or runner for L. Z. Farwell, of Freeport, and came to Belmont in August to get a claim of \$171 secured. He says defendant refused to pay or secure his claim until he had time to look over his books and see what shape he might be in; that defendant said he thought he could pay all his claims; that if he could not pay all he wanted to pay all alike, *pro rata*; that he had taken the step he had to protect himself, or secure himself; that he was afraid some of his creditors might come in on him and close him up; that he expected to be back doing business again after he got settled up; that he also had a talk with P. E. Brown at the store, in which he said he had all the stock and could not do anything for him; that afterwards he bought some goods of him, and then at his wagon said he was sorry they had been obliged to do as they had, but he was afraid, or they were afraid, some unprincipled creditor might come in on them and close them up, and they did it to protect themselves; that he expected R. H. Brown would be back again in the store doing business. These statements are positively denied by both the Browns.

Defendant swears that in making the sale his intention was to pay his brother, and Mrs. Brown, and the banker; that he thought his obligation to them was greater than to any other creditors; that he did not have enough to pay all, and so paid those to whom his obligation was greatest; that he was in a very precarious condition of health, and did not know as he would live long; that he did not want to leave his own family without a dollar; that he made the sale thinking it the best he could do in his circumstances, and that he had no thought nor intention of delaying or defrauding his creditors. The property he turned over to his brother was all he had, except about \$3,000 in notes, which came to him on a dissolution of the firm of Brown & Co., in 1878, of which he and his brother and father were members. That these notes were not very collectible, and that he owed about \$3,000, besides the amount that he owed his wife. These are the most material points in the testimony, which is quite voluminous.

Upon the whole case I think, if the indebtedness to his brother and wife and to Northrup & Co. was genuine, the defendant had the right to prefer them to his other creditors in the way he did, although the effect might be to hinder or delay, or even prevent entirely, the collection of the claims. And I have no reason to doubt, from the evidence, the genuineness of either of these debts. They are positively sworn to by both R. H. and P. E. Brown, with all circumstances of time, place and occasion, which it would be very dangerous, if not impossible, to create if the facts were not so. And there is no opposing testimony. The fact that one preferred creditor is a brother and another a wife, is, of itself, enough to raise suspicion of good faith and put the court on its guard; but, when the indebtedness is clearly proven, there is no doubt but a debtor may prefer his own wife and brother, and that they stand on a like footing with other creditors. *Hill v. Bowman*, 35 Mich. 191; *Waddams v. Humphrey*, 22 Ill. 661-663; *Giddings v. Sears*, 115 Mass. 505; *Banfield v. Whipple*, 14 Allen, 13; *Ferguson v. Spear*, 65 Maine, 277; *French v. Motley*, 63 Maine, 326-328; *Bump on Fraudulent Conveyances*, 218-223; *Waterman v. Donalson*, 43 Ill. 29; *Smith v. Acker*, 23 Wend. 653-679; *Beard v. Deloph*, 29 Wis. 136-140; *Carpenter v. Tatro*, 36 Wis. 297-301; *Monroe v. May*, 9 Kan. 466.

The declarations and admissions of defendant and his brother, allowing them to have been made as testified to by Joseph Brown, would hardly show more than an intent to delay the other creditors. But the allegation in the affidavit is that the defendant had conveyed or disposed of his property with intent to defraud, and an intent to hinder and delay is not made, under the statute, one of the grounds for issuing an attachment. What the plaintiff must prove to sustain the issue is an intent to defraud, and so long as the defendant had the right under the law to prefer and pay in full the creditors whom he did pay, though it took the most of his available property, and the effect undoubtedly was to delay or perhaps wholly prevent the other creditors from collecting their claims, these declarations of the defendant, in regard to the intent of the transaction, have much less bearing than

they would otherwise have. Fraud is not to be presumed without pretty strong proof, where the debtor, so far as his acts go, is doing only what the law fully sanctions.

I am satisfied, from all the evidence, that the controlling motive of the defendant in making the sale was to prefer his brother, his wife, and Northrup & Co., as creditors, and that the sale was made in good faith for that purpose.

Attachment dissolved.

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## THE STEAMSHIP UNITED STATES.

JOSLYN v. NICKERSON.

(*Circuit Court, D. Massachusetts.* February 9, 1880.)

**PILOTAGE—CERTIFICATE OF LICENSE.**—Certificate of master of steamer construed, and *held* that intent to authorize him to act as pilot, under Rev. St. § 4443, was sufficiently expressed.

**SAME—LICENSE BY INSPECTORS OF THE UNITED STATES.**—Inspectors of the United States have authority to issue a license to the master of a steamship to act as pilot between Boston and Havana.

**SAME—LOCAL PILOT.**—A steamship with a master so licensed is exempt, under Statutes of Massachusetts of 1862, c. 76, schedule, clause 15, from the payment of compulsory pilotage.

In admiralty.

LOWELL, J. This is a libel for pilotage, heard on appeal from a decree of the district court dismissing the suit. The facts were agreed in writing, substantially as follows: On the 2d of May, 1879, the libellant was a pilot, duly commissioned and qualified under the laws of Massachusetts, for the harbor of Boston, and he seasonably offered to take charge of the steamship "United States," which was approaching the harbor on a voyage from Havana, and was the first pilot to tender his services, which were declined. The "United States" is a steam vessel of 1,180 tons, owned in Boston, and subject to the navigation laws of the United States, and was sailing under a register. The master, mate and engineer had been duly licensed by the board of inspectors, and the master

was also commissioned by the same board as a first-class pilot, "as appears from the certificate, of which a copy, 'C,' is annexed." The certificate I will give presently. The vessel was fitted, equipped and used as a passenger steamship between Boston and Havana; carried passengers on this voyage; was under the charge of her said master; and was by him piloted into the harbor of Boston.

By the law of Massachusetts, Statutes of 1862, c. 176, schedule, clauses 4, 5 and 10, the "United States" would be liable for pilotage, unless relieved by clause 15. *The America*, 1 Lowell, 176. Clause 15 is as follows: "All passenger steam vessels regulated by the laws of the United States, and carrying a pilot commissioned by United States commissioners, are exempt from the compulsory payment of pilotage." When this statute was passed the act of Congress of August 30, 1852, (10 St. at Large, 51,) regulating steam vessels which carried passengers, was in force. By section 9, clauses 7 and 9, of that act, the boards of inspectors of steamboats were required, within their several jurisdictions, to examine into the character and qualifications of any person who should claim to be a skilful pilot, and should offer himself for a license, and, if they found him competent, to grant him a certificate licensing him as a pilot of such vessels for one year, within the limits prescribed in the certificate. Clause 10 imposes a penalty on persons acting as pilots of such steam vessels without a license from the inspectors. Many able lawyers were of opinion that this statute was intended to require all local pilots to be licensed by the inspectors of the United States. See *The Panama*, 1 Deady, 27, and the dissenting opinion in *Steamship Co. v. Joliffe*, *infra*. It is possible that the legislature of Massachusetts may have had this belief, but the supreme court decided in 1864 that pilots of harbors were not within the statute, and that, therefore, the state laws as to such pilots remained in force. *Steamship Co. v. Joliffe*, 2 Wall. 450.

After this decision was given an act of congress was passed requiring all American steam vessels, whether carrying passengers or not, excepting public ships of the United States, to

be under the control of one of these licensed pilots when under way, except upon the high seas. Stat. July 25, 1866, 14 St. at Large, 228. This statute has been modified, and the employment of such a pilot is now compulsory only upon coasting steam vessels not sailing under a register. Rev. St. § 4401; *Murray v. Clark*, 4 Daly, 468, affirmed, 58 N. Y. 684. This vessel, therefore, was not bound to carry such a pilot, and was bound by any law of Massachusetts which might require her to take a local pilot. Rev. St. § 4444.

The district court decided that the "United States" was carrying a pilot, within the exemption of the Massachusetts law.

A doubt has been raised for the first time in this court whether the certificate of the master licenses him to act as pilot. The statute permits one license to be granted to a master or mate to act as a pilot, and requires that it should "state on its face that he is authorized to act in such double capacity." Rev. St. § 4443. The agreement of the parties finds that Captain Hedge was thus authorized, but it refers to the certificate, and the libellant argues that if his construction of that instrument was mistaken he is not bound by his admission of a matter of law. I have procured a copy of the certificate, distinguishing what is printed or engraved and what written. It is as follows, the part in Italics being written and the remainder engraved:

"This is to certify that *Daniel Hedge* has given satisfactory evidence to the undersigned local inspectors of steam vessels for the District of *Boston, Mass.*, that he is a skilful master of steam vessels, and can be entrusted to perform such duties upon the waters of the *Atlantic Coast*; also, to act as *First Class Pilot between Boston and Halifax, P. E. I., and Havana, Cuba and intermediate ports*; and he is hereby licensed to act as such master on steam vessels for the term of one year from this date. Given under our hands this twenty-second day of *January, 1879.*

"*Andrew Burnham,*

"Inspector of Hulls.

"*Andrew J. Savage,*

"Inspector of Boilers."

If this paper is construed strictly, like a license to enter upon the land of another, the part which grants the license grants it only to Hedge as master. It would seem, however, from the appearance of the paper that it is a form of license for a master, having no space to add "and pilot," and from the fact being certified that Hedge can be entrusted to act as pilot within certain defined limits, and from the stipulation of the parties, I have no doubt it was intended, and in construing such an instrument as this I may hold that the intent is sufficiently expressed, that the master is licensed to act in the double capacity of master and pilot. Otherwise, the examination of evidence concerning his skill and competency as a pilot, and the judgment carefully written into the document that his evidence proves his qualifications so to act, are senseless and void.

It is admitted that the inspectors of steamboats are the United States commissioners referred to in the pilotage act of Massachusetts.

If the master was licensed as a pilot between Boston and Havana, the vessel was apparently exempted from paying the local charges. The libellant meets this defence by two arguments:

1. That the inspectors of the United States have no lawful authority to grant licenses excepting for coastwise service, that being the only kind of service in which pilots so licensed must be taken. The law does not seem to be so. I have looked through the various statutes now represented by title 52 of the Revised Statutes, and through that title, and find provisions in the same general language for inspecting the hulls and boilers of steam vessels, and for examining and certifying their masters, mates, engineers and pilots. There is nothing to distinguish pilots from masters, mates and engineers, and there is no law that I know of requiring a vessel to have a master or mate; but when these officers are employed they must be licensed. There seems to be no connection between the necessity for employing these persons and the necessity for their being licensed if they are employed. Nor can the words of the statute be limited to coasting ves-



sels. By Rev. St. title 52, § 4399, every vessel propelled in whole or in part by steam is a steam vessel within the meaning of that title. By section 4438 the inspectors shall license and classify the masters, chief mates, engineers and pilots of all steam vessels. This is the law; and its practical construction by the persons interested has always been general, and I see not how any other could be given.

It is to be added that there was no compulsory pilotage under the act of congress of 1852; and, therefore, the construction contended for deprives that statute of all force.

2. A second reply made by the libellant to the asserted exemption is that the statute of Massachusetts, when speaking of a licensed pilot, must be taken to mean one who is licensed to do the very act of pilotage which the local pilot offers to perform; and that, by the decision in *Steamship Co. v. Joliffe*, 2 Wall. 450, a pilot such as was on board the "United States" is only licensed for the high seas. There is much force in this argument. The answer to it is substantially the same which was given to the first point. Under the act of 1852, as construed, pilots were in reality licensed for the high seas; but they were the only pilots in existence to whom the Massachusetts act could apply. Therefore, if that act did not refer to pilots of this sort, it was without meaning and exempted no one. Whatever may have been the view of the legislature as to the scope of the act of congress of 1852, it was to meet that act, and to exempt such pilots as were licensed in accordance with its provisions, that clause 15 was framed. While, therefore, it is entirely competent for the legislature of the state to subject this class of foreign-going American merchant ships to this charge, I am of opinion that they have not as yet seen fit to do so, when a pilot licensed by the inspectors of the United States for the voyage actually performed is on board and has charge of the navigation.

For these reasons the decree of the district court is affirmed.

TINKER v. WILBER EUREKA MOWER & REAPER MANUFACTURING COMPANY.

(Circuit Court, S. D. New York. January 20, 1880.)

INVENTION—SPECIFICATION—DRAWING.—In a suit upon a patent a drawing can be looked at, if necessary in order to explain an ambiguous or doubtful specification, but cannot be made to supply the entire want of any part of a specification or claim.

SAME—PATENT.—Although a patent gives an exclusive right to the patented invention for all uses to which it could be put, whether contemplated by the inventor or subsequently discovered, still the invention must, in some way, be covered by the patent before such exclusive right can be acquired.

WHEELER, J. This suit is founded upon the second claim of Letters Patent No. 51,364, dated December 5, 1865, granted to John B. Tinker, for an improvement in mowing machines. Among other defences the defendant denies infringement. Both the orator's and the defendant's machines are operated by direct draft, and have finger bars resting in shoes, hinged backward to other parts at each end, which are carried by rollers, and alternately run in the standing grass. They are placed forward of the shoes, and roll down the standing grass in their paths, and thereby prevent tangling, which would occur and be detrimental, if the grass should be divided towards the bottom, for them to pass through. One question is whether the plaintiff's patent covers a roller so placed. The only part of the specification describing them, or in any way referring to their location, after referring to the shoes, says: "The shoes also carry rollers, 'F,' in front of the finger bar, which run upon the ground and sustain the weight of the finger bar." In other parts it describes the finger bar and cutters as arranged to do their work wholly between the driving wheels, or the courses of their tracks. The drawing shows the rollers, not only in front of the finger bar, but forward of the shoes.

The second claim is for "the combination of the carrying-rollers, 'F', with the hinged and extended shoes, 'E', arranged and located substantially as herein described." The arrange-

ment and location of the rollers and shoes referred to in the claim could only be placing the rollers in front of the finger bar, and the rollers and shoes within the courses of the wheels so as to carry the finger bar there, and could not have referred to placing the rollers in advance of the shoes. They were the arrangement and location therein described, and the location of the rollers in advance of the shoes was not therein described. The drawing could and should be looked at, if necessary, in order to explain an ambiguous or doubtful specification, and to make the invention capable of being understood and used. Curtis on Pat. § 262. *Hogg v. Emerson*, 6 How. 437. But it cannot supply an entire want of any part of a specification or claim in a suit upon a patent, although it might afford ground for a reissue covering the part shown by it. U. S. Rev. St. § 4916. That the specification was not intended to cover rollers wholly in advance of the shoes to roll down the grass in their tracks, is evident from the fact that no mention is made of that purpose, nor of doing away with a projection of the shoes ahead of the rollers, which had sometimes been used to divide the grass, nor of a broad tread to the wheels, or any other arrangement calculated to roll down the grass. These things are not referred to in any supposition that it was necessary for the inventor to specify all the uses to which his invention could be put in order to cover them, but for the purpose of ascertaining what invention was in fact specified and covered for any use. There is no doubt but that, as argued for the orator, the patent would give an exclusive right to the patented invention for all uses to which it could be put, whether contemplated by the inventor, or discovered by himself or others afterwards. *Roberts v. Ryer*, 91 U. S. 150. But the invention must in some way be covered by the patent before he can acquire an exclusive right to it for any purpose.

Although Tinker constructed rollers in advance of the shoes so they would roll down the grass, and without anything before them that would divide the grass and prevent it being rolled, he does not appear to have apprehended what their utility would be in preventing tangling of the grass over the

parts of the machine next to the grass left uncut to their hindrance, nor to have obtained a patent for that device. The use of such rollers is what the orator complains of, but the patent she owns does not appear to cover them, therefore the defendant does not appear to infringe her patent as it was granted. Decree dismissing bill.

**CROWELL v. NATHANIEL E. HARLOW.**

**CROWELL v. GEORGE HARLOW.**

*(Circuit Court, D. Massachusetts. January 17, 1880.)*

**INVENTION—IMPROVED PROCESS OF CURING FISH.**—An improvement in the process of curing fish by the removal of the mucous membrane is patentable, when it was not formerly known that such membrane was injurious to the keeping quality of the fish.

These causes were tried together, it being agreed that the facts were precisely alike in both.

John Atwood obtained a patent, No. 90,334, May 25, 1869, for an improved process of curing and putting up fish. He declared in his specification that the cause of the offensive odor of fish cured in the ordinary way was the mucous membrane between the skin and the flesh, which when dried and afterwards moistened became slimy and offensive. His new method was thus described: "When the fish is fresh, I take out the principal bones and fins, the fish remaining whole or split in halves. When partially dried and cured with salt I remove the skin, and with it the entire mucous membrane, the cause of the offensive odor of salt fish. I then pack in tight wood boxes, of convenient size, for instance from ten to one hundred pound boxes." He claims: "The method or process for curing and putting up fish substantially as described." It was explained that the method was particularly applicable to cod and haddock.

From the evidence and the stipulations of the parties, it appeared that the patent was now owned by the plaintiff; that the method of Atwood had been described to the defendants, and that they had taken licenses from the plaintiff, which both parties understood to be for the term of one year, which had expired before the bills were filed. At the hearing, it was suggested by the defendants that the licenses might be construed to run for the whole life of the patent, but the answer had not taken this defence. There was evidence tending to show novelty, utility and infringement. The point argued was, whether there was invention to support the patent.

*Chauncey Smith*, for complainants.

*George A. King*, for defendants.

LOWELL, J. There is so little doubt upon the main issues of this case that patentability has been the only question argued. The witnesses on both sides agree that in practicing the important and valuable industry of drying and curing cod and haddock for the markets at home and abroad, down to the year 1869, the fishermen and others engaged in that industry prepared the fish by splitting them, removing the fins and offal, and taking out the principal bones, and in that state the fish were salted and dried, and presented the appearance with which we are all familiar. They fully agree that the patented method is a great improvement upon that before practiced. If this method were merely to remove more of the bones, or to skin the fish, or both, it would seem to require and prove only the exercise and skill in handling the fish, and taste in making them attractive. So, the packing in boxes is clearly no invention.

The evidence goes further, and proves that Atwood made a discovery; that there is in the fish, to which his invention is applicable, what he calls a mucous membrane, and what others call an inner skin, or a sort of film, and that the removal of this membrane is not necessarily effected by skinning the fish, unless attention is given to this inner skin, and that the presence of this inner skin is highly injurious to the keeping quality of salt fish. It is singular that such a dis-

covery should be made at this late day, but I have no right upon this record to deny it.

After this discovery was made, it would probably occur to any one interested to apply it in the art of curing fish, and the mode of application is simply to remove the membrane. I see no reason why the person who improves the art of curing fish by removing a part of the animal not before known to be injurious, but in reality so, should not have a patent for it. It is gratifying to know that the patentee is the person who made the discovery; but, in the absence of a theft, the one who communicates the fact to the public, and shows its application, would be, I should suppose, an inventor—at least under the older decisions—and, *a fortiori*, the discoverer of the fact. If the fact itself were well known, there might be no invention. For instance, to cure hams by salting and smoking would not sustain a patent if the virtues of salt and smoke were well known, and had been applied in analogous arts. It would not be invention to salt a fish more or less thoroughly. But a patent might properly be granted for curing fish with a substance which had never before been used for any similar purpose, and which would effect the old result of curing the fish in a better or cheaper way, of which last fact the infringement would be sufficient evidence. I am unable to distinguish between adding and taking away, if the result is to improve the art.

Decree for the complainant.

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### GREEN v. GORDON and others.

(Circuit Court D. Massachusetts. January 30, 1880.)

TRUSTEES—ACTION AT LAW UPON AN AGREEMENT TO ACCOUNT.—Trustees cannot be charged in *assumpsit* or trover with the "earnings" of an estate for a specific period, under an agreement to account for the same

This was an action of contract, to which the defendants demurred.

The plaintiff was beneficial legatee of the income of the

residue of the large estate of her aunt, the late Sylvia Ann Howland, of New Bedford, after the payment of many legacies and the establishment of several smaller trusts. This residue was devised to trustees who were to pay the net income to the plaintiff during her life, and at her death to divide the principal among all the lineal descendants, then living, of Gideon Howland, the grandfather of the testatrix. The defendants are the trustees.

The settlement of the estate of the testatrix was delayed by litigation for several years; and in 1870 a compromise was agreed to by all the persons directly interested in the estate, and was confirmed by the supreme judicial court of Massachusetts, by which the amount to be paid the legatees, other than the plaintiff, was fixed, and the defendants, as trustees, were to take the assets after the payment of these legacies, and the debts and charges of administration, and divide said residual portion into two parts: first, the earnings of the estate since the death of Sylvia Ann Howland; and second, the remainder of said residue. The agreement then proceeded: "And said trustees shall, under the provisions of the trust, account for said first part to said Hetty H. Green and her legal representatives; and said second part shall constitute the principal of the trust fund, to be retained and kept by them as trustees, under the provisions of said will and codicil." By a supplemental agreement between the plaintiff and the defendants it was explained that "earnings," in the former agreement, should mean earnings less interest on the legacies.

These agreements, for a breach of which this action was brought, are printed in the report of *Manlell v. Green*, 108 Mass. 277. The plaintiff's action was for certain dividends of stock, amounting to a very considerable sum, received by the defendants from the administrators, which the plaintiff insisted should be given to her as "earnings," and which the defendants considered to belong to capital.

A bill in equity to settle this question had remained dormant for some years for want of parties. See *Gordon v. Green*, 113 Mass. 259.

The demurrer raised the question whether an action at law could be maintained upon the agreement and supplement.

*C. W. Clifford*, for plaintiff.

*T. M. Stetson*, for defendants.

LOWELL, J. This case reverses the usual relative positions of law and equity. It is brought at law because the remedy in equity has been found inconvenient.

I have no doubt that there is power somewhere to settle the plaintiff's income at some time before her death, which will at once relieve her from occasion for income, and ascertain who are the remainder-men; nor have I any belief that the supreme judicial court intended, by their intimation in *Green v. Gordon*, 113 Mass. 259, to require impossibilities.

I do not, however, understand that, by the settlement, the trustees promised to pay over the value of the earnings, so that they can be charged as *assumpsit* or trover with that value. They agreed to account as trustees; that is to say, in a court of equity, where questions of part performance, compensation to the trustees, costs, interest on what they should have paid, etc., can be determined and adjusted with a due regard to the equitable rights of all parties. Their agreement is that they will, "under the provisions of the trust, account;" and by reference to these provisions it will be found that they have a discretion as to times of payment. I do not, of course, mean to say that they could withhold it for years; but they may exercise a discretion on the subject. In short, I look upon the agreement as a sort of codicil, settling how the *corpus* of the trust should be ascertained; varying, perhaps, the rights of the parties, but not the remedy for a breach of trust, and not intended to impose a personal legal obligation to pay, instead of an equitable duty to account.

Demurrer sustained.



**HEERMAN v. BEEF SLOUGH MANUFACTURING, ETC., Co.**  
and others.

(*Circuit Court, W. D. Wisconsin. ———.*)

**NAVIGABLE STREAM—USE AS A PUBLIC HIGHWAY—OBSTRUCTIONS TO STEAMBOAT NAVIGATION.**—Where a river lies wholly within the territory of a single state, and certain piers and booms have been erected in that river by a private corporation, under the authority of the legislature of that state, such piers and booms will not be abated by a court of equity, at the instance of a private individual, as a nuisance, although they obstruct the steamboat navigation of the river, and such corporation has exceeded its powers in the erection of the same.

**SAME—INJUNCTION—ACTION AT LAW.**—In such a case, where the interests involved are very large, and the improvements complained of have been erected under color of legislative authority, and have been used in facilitating an important branch of commerce, and have been acquiesced in for a long time, a court of equity will not interfere by perpetual injunction until the right of the party complaining has been established at law, and it appears that no adequate compensation can be afforded in damages.

**SAME—CHIPPEWA RIVER—TRANSPORTATION OF LOGS.**—The use of the Chippewa river by the public as a highway for the transportation of logs and lumber is a right common to all, recognized and protected by the municipal law; and such right must continue so long as the public have any need of its exercise, unless changed or abrogated by the legislature of the state or by congress.

BUNN, J. This action is brought by the plaintiff, a resident of Minnesota, and the proprietor of certain steamboats engaged in the navigation of the Chippewa river in Wisconsin, against the defendants, two corporations existing under the laws of Wisconsin, to restrain and prohibit them from running loose logs in the Chippewa river, and to compel them to remove therefrom certain piers, booms and dams, placed therein by the defendants, to aid and facilitate the running, driving and storing of logs, on the ground that such piers, booms and dams, and the running and driving of logs in said river, constitute an obstruction to navigation, and are therefore a nuisance which ought to be abated and perpetually enjoined by the decree of this court.

The case was heard upon a general demurrer filed by the defendants to the plaintiff's bill of complaint.

The allegations of the bill are quite voluminous, a great many facts being alleged which go to show that the improvements placed in the Chippewa river by the defendants, and the running of loose logs therein by them, materially interfere with the running of rafts of lumber, the running of ferry boats across the stream which carry the United States mail, and also with improvements of the river which are being made and in contemplation of being made by the government of the United States, as well as with agricultural and manufacturing interests of the people along the river. But as the plaintiff does not connect himself in any way with any of these several interests, or show that the alleged obstruction to these interests especially affect him, it would seem that these allegations, which take up so much room in the bill, are surplusage and quite immaterial to the plaintiff's case.

The allegations which are essential to a proper understanding of the case are in substance as follows:

That the Chippewa river, for 100 miles above its mouth, is a navigable highway and water of the United States, leading into the Mississippi river, and an avenue of commerce between the state of Wisconsin and other states of the Union, for conveying, by ascending navigation, the products of other states and countries, with boats and barges, and for conveying the products of this state, by descending navigation, with boats, rafts, etc., to markets outside of the state; and that the said river has been so used for the past 30 years, and has been recognized by the Congress of the United States as a public highway and navigable stream.

That appropriations were made by Congress in 1874 and 1875, for the purpose of making examinations and survey of the stream. That such surveys were made and approved by the United States, and public improvements on the river have been begun.

That the plaintiff for twelve years has been engaged in steamboating on said river between its mouth and the city of Eau Claire, at the head of navigation.

That the defendant, the Beef Slough Manufacturing, Booming, Log Driving and Transportation Company, is a joint

stock corporation, organized in the year 1867, under chapter 73 of the Revised Statutes of Wisconsin, for the declared purpose of driving and booming logs, manufacturing lumber, doors, etc., on and at the head of Beef Slough, on the Chippewa river.

That before 1870 the said defendant company constructed in said river, and on Beef Slough, which is one of the channels of the river, without any lawful authority, a number of piers of wood and stone of great size and strength, and connected the same by booms placed in the river, in such a manner as to cause a considerable obstruction to the navigation of the river, and so as to divert, to some extent, the waters from the main channel into said Beef Slough; that afterwards, in the year 1870, the legislature of Wisconsin passed an act entitled "An act to define certain rights and duties of the Beef Slough Manufacturing, Booming, Log Driving and Transportation Company," known as chapter 299 of the Private and Local Laws of 1870, by which the state attempted to authorize the said company to maintain the said piers and booms constructed for the purpose of turning loose logs floating in said river into Beef Slough, and to construct and maintain in Beef Slough, and upon the land owned and leased by said company, such piers, dams and booms as might be necessary to confine the water of said slough to its proper channel, and to secure the logs running into the same: *provided*, that no booms, dams or piers should be constructed which should prevent the free and unobstructed passage by boats through Beef Slough, or from Beef Slough into Perrin Slough, so called; and *provided* further, if within 18 months from the passage of said act good and sufficient provisions were not made for the free and unobstructed passage aforesaid, then the privileges granted by said act should cease; and the said company were required to pave and stone the bed of said Beef Slough at or near its connection with said Chippewa river, for the purpose of maintaining the level of said bed and preventing an excess of the volume of water flowing over the same. And whereby it was provided that said company should have the exclusive privilege of driving and booming all logs, timbers,

railroad ties and fence posts which might run into Beef Slough, until the same should have been delivered to the owners thereof below the main rafting boom of said company, which was situated near the mouth of said Beef Slough; and whereby it was provided that said company should have the right to charge for driving from their booms, at or near the head of said slough in the Chippewa river, and for booming and delivering, as aforesaid, such logs, timber, railroad ties and fence post, at certain specified rates.

That the said Beef Slough is in fact a navigable branch of said Chippewa river, and departs from the main channel about 18 miles above the outlet of said slough into the Mississippi river, flowing into the latter river about nine miles below the mouth of the main Chippewa, and is, in its greater portion, navigable for boats, barges and rafts, and a considerable portion thereof was so advantageously used before the unlawful obstruction thereof by said defendant; that, at all times prior to the obstruction of the same by said defendant, the main and natural channel of said river flowed to the south of said Beef Island, and the same was the principal navigable channel of said river prior thereto, and such channel was known and called by the name of the river.

That upon the north side of said Beef Island there is a channel known as Horse Slough, which is of greater length and more circuitous than the river aforesaid, and which, prior to said obstructions being placed in the main river, while possible to be navigated in seasons of high water, was not commonly employed in navigation by either steamboats or rafts. That the defendants, with the intent and design to obstruct the navigation of said slough and river, and to secure the gains and profits of tolls, have, without any authority of law, erected, since 1870, large wood and stone piers in addition to those already in said slough, and in the main river at and near the head of said slough, and also above said Beef Slough at Round Hill, and near the head of Horse Slough in said river, and have constructed piers and booms in connection therewith in such manner as to have entirely blocked up and obstructed the original and natural navigable channel of said

river, and also Beef Slough, to such an extent as to have entirely prevented the passage of steamboats, barges and rafts therein, and have, by such works, since the year 1874, turned the water of said river not deflected into Beef Slough, for the purposes of their private business, as hereinbefore stated, into the said Horse Slough channel, so that no other channel remains open to ascending or descending navigation, and thereby they have greatly obstructed and impeded the free and natural navigation of said river for boats, barges, rafts and other water craft, and have made such navigation much more circuitous, difficult and expensive, and have rendered it necessary to construct additional and special jetties or dams in order to improve the navigation of said Horse Slough, and have deflected a part of the natural flow of water from the Chippewa river into said Beef Slough, and thereby injuriously diminished the natural volume and force of the current thereof, so that the same is much less capable of supporting the navigable boats and rafts therein, and less able to remove by natural action the sand bars formed at the mouth of the river and along its course; and by their said piers and booms have turned all logs, timber, railroad ties and fence posts floating in said river into said Beef Slough, and so provided and adapted the same that all such logs, timber, railroad ties and fence posts must necessarily be turned into said Beef Slough, and thereby have taken possession thereof, and in the future, unless restrained by the court, will continue so to take possession of and force the same into said Beef Slough, and there assume sole control of further driving the same until they shall reach the outlet into the Mississippi river. And have erected and constructed in said Beef Slough other piers, booms and dams in such manner that they have taken exclusive possession thereof, and entirely prevented any navigation or use thereof by the public, including the plaintiff, by boats, barges, steamboats or otherwise, and give out and threaten that they will henceforward continue so to do.

That in the year 1869 or 1870 the defendant, the Beef Slough Company, without any authority of law, entered upon the business of cutting, in the winter season, upon lands sit-

uated upon the head waters of the Chippewa river, pine logs and timber, and casting them upon the waters of said river to be floated by force of the current, during spring and early summer, down the said river, for the distance of about 150 miles, to the booms of said company at Beef Slough. That in the beginning the number of logs so cut and cast upon said waters was comparatively small, but the said company have since, in combination with the other defendants to this bill, continually increased the extent of such business and the quantity of logs so cast upon said waters, and with each successive year increased the obstructions and dangers to navigation.

That subsequently said Beef Slough Company combined with the Mississippi River Logging Company, and greatly increased the said business of cutting and floating logs upon said river, and greatly augmented the said obstructions to navigation.

That for the purpose of securing some colorable right to such operations the defendant, the Chippewa River Improvement and Log Driving Company, was organized by articles dated the first day of February, A. D. 1876, for the purpose of driving and transporting logs and timber from the upper waters of the Chippewa and tributaries to and into Beef Slough, and to improve said Chippewa river and its tributaries, by constructing dams and piers, booms, levees, dykes, cut-offs and such other structures, in such other streams as may be deemed necessary to insure or increase the facility of such streams for the running, floating or driving of logs or timber, with power to charge and receive a reasonable sum by way of compensation on the logs or timber so run or floated.

That since the date of the said articles the three corporations aforesaid had united to injure and destroy the navigation of said river, and have largely increased their operations aforesaid, so that during the year 1877 the said defendants did, directly and indirectly, cast upon and cause to float down the said river to Beef Slough about 200,000,000 feet, board measure, of pine logs, being about 1,000,000 of such logs in number. And the said defendants, combining, give out and

threaten that they will henceforth continue to increase their said operations, and will, year after year, cut and cast upon said river, to be floated down from the upper waters thereof to Beef Slough, still greater numbers and quantities of such pine logs.

That the effect of such acts and business of the defendants has been and will be to render the navigation of said river, during those portions of the year when navigation from natural causes is the best, exceedingly difficult, dangerous and expensive.

That the course of the operations of the said defendant has been and will be to cover the surface of said stream with logs floating down the same in great masses, so that the entire channel of the river has been, and will hereafter be, occupied by them during the period of several weeks in the spring months, and for many weeks during the rise of the water in summer. And such logs have been and will be left, wholly unguided, to run as the course of the current directs, and generally to float with the rapid motion, and by reason of the numbers in which they have hitherto been placed in said river, they have a force much superior to that of single logs, and sufficient to crowd out to one side floating vessels with which they come in contact, by reason of which it has hitherto happened, and must happen in the future, that the steamboats of the plaintiff have been much impeded and much delayed in navigation by day, have been oftentimes broken and seriously damaged in their wheels, and have been compelled to entirely suspend their course by night, and tie up to the bank to escape the dangers threatened by such running logs; and the amount of navigation has been greatly diminished, and must hereafter continue to diminish until the same shall cease, unless the use of such river for such purposes be restrained.

That the floating of logs as aforesaid on said river has caused great and permanent injury to the navigability of the stream, by striking against and breaking down the banks thereof, and thereby widening the river in some places, and making it shallow and less navigable.

That the plaintiff has often been compelled to suspend, for a considerable number of hours at a time, the running of his boats, especially by night, in consequence of the danger from running logs, imposing large expense upon him; and on different occasions the rudders, wheels, log chains and guards of his boats have been broken and rendered unserviceable in consequence of said logs running in said river. That twice the plaintiff's barges have been sunk by reason of the running logs, and that damages have in various ways been inflicted upon him, exceeding in amount the sum of \$6,000. That said defendants have, during the spring of 1878, made a boom at the head of Beef Island which extends across the main and only practicable channel of the said Chippewa river in such a manner that no boats can safely pass up or down the said river unless said boom be opened or taken away.

That the ostensible purpose thereof is to turn floating logs into Beef Slough, but the same is unnecessary for such purpose, but the real object and effect of the same is to divert a larger volume of said water into said slough, and the effect of such boom will be to divert the waters to a great extent into Beef Slough, so as to practically destroy steamboat navigation on said river, and also to form a sand bar across the main channel of said river and effectually block up the same against the passage of boats. And the said defendants have constructed 10 or 12 sheer booms in said river in such manner as to endanger the passage of steamboats, the same projecting far into the stream, and kept without a light or any man upon them, whereby the hulls of steamboats ascending said river are in great danger of being struck and punctured, and boats are often seriously injured and delayed in the effort to pass the same; and that at Round Hill the defendants have built a boom, more than a third of a mile in length, so as to have entirely cut off the former channel at that point and to cause the same to fill with earth and sand, and in extension thereof have built a sheer boom of such length that the same can be extended entirely across the river; and in entire disregard of the rights of the plaintiff the said defendants frequently carry and extend the same so



as to leave but a single, narrow, deficient, and dangerous passage between said boom and the opposite bank.

That the defendant the Chippewa River Improvement and Log Driving Company, aided and abetted by the defendant, the Beef Slough Company, have, during the summer of 1878, constructed on the Chippewa river, at Little Falls, a large dam, entirely across the said river, 16 feet in height, at a point where, by reason of the low surface of the country above, on the banks of said river, such dam will cause a very wide overflow and backset of the water.

That said dam has been constructed solely for the purpose of gathering a reservoir or supply of water sufficient to float the logs of said defendants at any season of the year, when the volume of water in said river would not naturally be sufficient in its ordinary flow, and that said defendants give out and threaten that they will, at any time in the year, when they desire for the convenience of their log driving, entirely shut said dam and stop the flow of water in said river until the said dam shall be filled, and will then let it off in such quantities as shall be convenient to them to drive logs therewith. That for such purposes the said dam is constructed with 32 gates, to enable the defendants to regulate the escape of water for their convenience. That when the same is closed there is not water enough left in the Chippewa, below Eau Claire, to enable steamboats or barges to be employed. That on October 29, 1878, said defendant, the Chippewa River Improvement Company, without any previous notice, closed their said dam and kept the same closed for a period of seven days, and thereby two steamboats of the plaintiff, which were then in said river, were left without sufficient water to navigate upon, and ran aground and were injured, and were compelled to suspend their regular trips for a period of seven days, to the great damage of the plaintiff. And again, on the eighth of November, the defendant again closed said dam and shut of the water for five days, with similar effect, and by means of said stoppages plaintiff suffered \$1,000 damage. And the defendants give out and threaten that they will hereafter continue to stop the water

of said river to suit their convenience, from five to eight days at a time.

And the plaintiff prays that the defendants be perpetually enjoined from the running of loose logs in the river, and that the court will adjudge such piers, booms and dams to be a nuisance, and that the same be abated, and that the defendants be required to remove the same and restore the said river and slough to their original condition.

The demurrer raises the question whether, upon the facts alleged, the court can make a decree granting the relief prayed for.

We think it cannot.

1. The bill of complaint seems to be framed upon the theory that the Chippewa river being navigable for steamboats as well as for the purpose of floating saw logs to market, there is something peculiar and sacred under the constitution and laws of the United States and the state of Wisconsin, about steamboat navigation, that should give it the preference over and entitle it to the protection of the law against this other form of commercial enterprise. And no doubt if congress, by virtue of the commerce clause in the constitution, should at any time assume legislative jurisdiction and control of the navigation of the Chippewa river, as it may at any time do, that body could subordinate the logging interest to that of steamboat navigation, or might prohibit the use of the stream for such purpose altogether. Under the authority to regulate commerce its power is supreme, whenever it shall see fit to exercise it. But until congress assumes to control the commerce of the river, I take it to be clear law that, as to those streams that lie wholly within the territory of a state, though approachable by other streams from other states, as in this case from the Mississippi river, that the state within whose boundaries such river lies may legislate in reference to its commercial use as a public highway; and such has been the uniform practice throughout the country. This doctrine was first settled by the supreme court in the case of *Wilson v. The Blackbird Creek Marsh Co.* 2 Pet. 245-250.

The legislature of Delaware had passed an act authorizing that company to construct a dam across Blackbird creek, which the company proceeded to construct. The defendant, being the owner of a sloop regularly enrolled and licensed under the laws of the United States, broke and injured the dam. The company brought suit for the injury. The defendant set up as a defence those facts, and that the creek was a public navigable stream under the laws of the United States, etc. The plaintiff demurred, and the demurrer was sustained by the supreme court and court of appeals of Delaware, and on appeal by the supreme court of the United States, Chief Justice Marshall delivering the opinion. Of course the dam was an obstruction to navigation, but it was authorized by the legislature of the state, and such legislation was held not to be repugnant to the constitutional power of congress over the subject, so long as congress had never chosen to exercise that power.

Again, the same doctrine was affirmed in *Gilman v. Philadelphia*, 3 Wall. 713, a very instructive case. And, still later, in *Pound v. Turck*, 95 U. S. 459, which was a case that went up from this district, and arose out of the construction of a dam across the Chippewa river. Pound, Halbert & Co., under the authority of the legislature of Wisconsin, had erected a dam across the river. Turck, as assignee of French, Leonard & Co., brought an action to recover damages sustained by the delay and breaking of a raft of lumber caused by the obstruction of the dam. There was a verdict for the plaintiff, but the cause was reversed in the supreme court, following the authority of the two previously adjudged cases above cited.

So far, then, as the obstructions to steamboat navigation caused by the booms and piers put in the river by the Beef Slough Company at the head of Beef Slough and vicinity are authorized by the state legislature, they are not a nuisance to be abated by a court of equity, even if the plaintiff had shown that he has been especially damaged by them, which he has not. The use of the river as a common highway is clearly a

proper subject for regulation by municipal law, until congress shall assume control of it in the interest of commerce.

2. Section 1, c. 299, Private and Local Laws of 1870, provides that "the Beef Slough Manufacturing, Booming, Log Driving and Transportation Company are hereby authorized to maintain the piers, side, shore, sheer or glancing booms already constructed and heretofore used by them on and along the Chippewa river for the purpose of turning loose logs floating therein into Beef Slough, and to construct and maintain in Beef Slough, and upon land owned or leased by them, such piers, dams and booms as may be necessary to confine the water of said slough within its proper channel, and to secure the logs running into the same," with the provisos before mentioned, and the provision for paving the mouth of Beef Slough, which proviso and requirements the complaint alleges have not been complied with by the defendant.

It must be admitted that the authority conferred by the law of the state upon the company to enable it to take possession of Beef Slough for the purpose of maintaining piers, booms and dams is very broad. Still it is alleged that the company, in placing such obstructions in the river and in engaging in the business of cutting and putting logs into the river, has exceeded its corporate powers, and therefore that such obstructions constitute a nuisance, and the defendant ought, in equity, to be compelled to remove all its improvements, whether authorized by law or not, and be enjoined from running any more logs in the river. But it appears to the court, on principle and authority, that such is not the proper remedy, and that the subject cannot be regulated by injunction, or other decree in chancery. Allowing that the company has exceeded its corporate powers in putting in the improvements, and in engaging in the running of logs, and has not complied with all the conditions of the acts of the legislature, it does not follow that a court of equity can decree a forfeiture, for it amounts to nothing less if the prayer of the bill is granted, in a collateral proceeding like this brought by an individual. That is rather a matter between the corporation and the power which created it. So long as the state is sat-

ified, and does not interfere either through its legislature or by a direct proceeding in court to recover penalties, or to avoid its charter, it is not for a court of equity to step in at the instance of a private individual, declare the entire improvements a nuisance, cause them to be removed, and enjoin acts of which he may complain.

In a case of such magnitude, where the interests involved are so vast, and the improvements complained of as obstructions to navigation have been constructed under color of legislative authority, and have been used in facilitating an important branch of commerce, and acquiesced in so long, a court of equity will not interfere by perpetual injunction until the right of the party complaining has been established at law, and it appears that no adequate compensation can be afforded in damages. *Burnham v. Kempton*, 44 N. H. 78; *Wason v. Sanborn*, 45 N. H. 169-172; *Ripon v. Hobart*, 3 Mylne & Keen, 169-179; *Eastman v. Manufacturing Co.* 47 N. H. 71; *Irwin v. Dixon*, 9 How. 10-25; *Remington v. Foster*, 42 Wis. 608; *Weller v. Smeaton*, 1 Cox, 102; *Delaware & Hudson Canal Co. v. Lawrence*, 2 Hun, 163-168; *Mohawk Bridge Case*, 6 Paige, 554.

So long as congress does not assume jurisdiction of the river to control and direct its commerce, the defendants have the right to maintain such piers, dams and booms in the river, for facilitating the running and securing of loose logs, as the state by its legislation has authorized, though they may constitute a material obstruction to other branches of commercial enterprise on the river. And if they, in putting in such improvements, have exceeded their authority, or have not complied with all the conditions imposed, that is a matter which cannot be inquired into and remedied in a suit of this nature by a private individual.

It is noticeable that the plaintiff does not show, by any allegations of fact, that he has himself sustained any special, direct and material damage beyond the public at large, on account of the erection and maintenance of the defendants' improvements at and in the vicinity of Beef Slough, which he should do to put him in position to maintain his suit. *Ir-*

*win v. Dixon*, 9 How. 10-25. All the special injury he has sustained has been on account of the floating of loose logs in the river, and the action of the defendant, the Chippewa River Improvement and Log Driving Company, in combination with the other defendant, in erecting a dam on said river at Little Falls, some 50 to 75 miles above Eau Claire, the head of steamboat navigation, by which the defendants have held back the water to such an extent, from five to eight days at a time, on two different occasions, as to materially obstruct the navigation of the river below Eau Claire, and hinder and retard the plaintiff in the running of his boats.

But if the defendants have the legal right to float logs in the river, and to dam the river for that purpose, then the plaintiff has not set out enough to enable him to maintain a bill in equity for a perpetual injunction.

That the defendants, in common with the public, have the right to float logs down the Chippewa and other rivers and streams in the lumbering portions of the state seems to me incontestable; and if so, then equity will not grant relief against the use of the river for such purpose, although the right may be so exercised on occasions as to cause damage to individuals engaged in other departments of commerce. Equity will follow the law and not go in opposition to it. And if there happen, as there may, an abuse of the legal right, equity will not interfere to forfeit or crush out the right, but will turn the injured party over to his action at law for damages.

This is the only practicable course; for the manner in which the river shall be used by these several interests cannot, from the nature of things, be regulated by injunction. All a court of chancery could do, if anything, would be just what the plaintiff asks for in this case—enjoin and prohibit the use of the river for the purpose of floating logs, the use of the improvements placed in the river to facilitate that interest, and compel them to be taken out; which would amount to a complete denial of the right, and the forfeiture of an immense property, and a vast commercial interest. It cannot by a decree regulate the use of these improvements,

nor the use of the river as a common highway by the proprietors of these different interests, any better nor so well as they are now defined and regulated by the law.

The Chippewa river is a public highway, and if a person should, without authority from the state, and disconnected with any purpose of improving or facilitating any branch of commerce upon the river, place obstructions in it, perhaps, in a suit brought by the proper party, equity would relieve against such obstructions to commerce by declaring them a nuisance, and enjoin their use. But the court cannot, by its decree, regulate the use of the river by the several classes of persons pursuing different lawful branches of commerce and navigation, any more than it can that of any other highway. The rights of these several classes are already well enough defined by law, and if any person or class of persons take or exercise a too exclusive or unreasonable use or possession of the river, to the injury of other persons, the law affords an adequate remedy in damages. What would be an unreasonable use of the stream for purposes of commerce, such as would give a right of action at law, must be determined from a full consideration of all the facts and circumstances of the particular case, and should be submitted to a jury.

A good deal might depend upon the relative importance of these different interests to the welfare of commerce and the public good; for the court, as already intimated, cannot admit that there is anything peculiar about steamboat navigation that should give it any preference or superiority over other forms of commerce, upon a stream adapted in a greater or less degree to both. The interest which the public has in the matter is to see that the stream is kept open and free to the use of the public for those purposes of commerce for which by nature and adaptation it is best fitted. If, in the judgment of the state and of congress, it is worth more and can be more advantageously and profitably used for the purpose of floating to market the products of the vast pine forests of the state than for the navigation of steamboats, then it should be used for that purpose. Or if it can be as profitably and advantageously used for both, then it should be so used, under the

aw, as it is found, and under such regulations as the legislature may from time to time make. The matter is peculiarly a subject for municipal regulation. As a matter of fact, the lawfulness of the use of the Chippewa river by both these interests has been fully recognized by the state.

That the use of the Chippewa river, in common with many other rivers and creeks in the northern half of the state, for the floating of logs as well as lumber to market is a lawful use, there is no manner of doubt. It has been practiced for nearly or quite half a century, and although the right has sometimes been denied by those engaged in other commercial interests, the use of these streams for such purpose has been general and uninterrupted for a long period, and from a time antedating the organization of the state government. The vast importance of the logging and lumbering interests on the Chippewa river sufficiently appears from the bill of complaint, and if it did not the court should take judicial notice of it. To do otherwise would be for the court to affect ignorance upon a subject of common notoriety, respecting a leading commercial interest of the state.

The lawfulness of this right has been repeatedly recognized and upheld by the decisions of the circuit and supreme courts of Wisconsin, as well as by a long course of state legislation, and is fully recognized by the act partially set out in the complaint, by force of which the Beef Slough Manufacturing, Booming, Log Driving and Transportation Company claims the right to maintain the piers and booms in the river, which are in part the subject of this suit.

By chapter 399 of the General Laws of 1876, entitled "An act to facilitate the driving of logs down the rivers of this state, and their tributaries," as well as chapter 144 of the Laws of 1872, of which it is amendatory, the right is explicitly recognized, and authority conferred for the organization of incorporated companies for the purpose of driving, sorting, and delivering logs on the rivers of this state, and their tributaries, and for the improvement of such rivers and tributaries for such purpose; and it was under and by virtue of the authority of these acts that the other defendant, the Chippewa



River Improvement and Log Driving Company, was organized, and constructed the dam at Little Falls to create a reservoir from the surplus water in times of a high stage, and detain it to be discharged and used for the floating of logs as it should be needed. And the decisions of the courts have gone far in holding these streams navigable highways for the purpose of floating logs; no further, however, than the public need has required. Indeed, it seems a public necessity that these streams, which may be profitably and advantageously used for the floating of pine logs at recurring seasons of the year, especially with the aid of dams, which the law authorizes, and which of late it has become a common practice to employ—though they may go dry at other times—should be held navigable in fact for such purposes.

There is, perhaps, no other way by which the wealth of the pine forests of the state can be utilized with advantage or profit. *Whisler v. Wilkinson*, 22 Wis. 572; *Olson v. Merrill*, 42 Wis. 203.

The supreme court has also affirmed the validity of state legislation which provides for the improvement of the river by the building of booms and dams for the purpose of facilitating the running of logs. *Tewksbury v. Schulenburg*, 41 Wis. 584; *Wis. River Improvement Co. v. Manson*, 43 Wis. 255.

This use of the Chippewa as a lawful use has been more than once recognized and affirmed by congress in acts appropriating money for the survey and improvement of the stream, and especially in 20 U. S. St. at Large, 372, in a proviso annexed to the appropriation as follows: "That nothing shall be done, nor shall any improvements be made on the said Chippewa river under or in pursuance of this act, or the appropriation hereby made, which shall directly or indirectly prevent, interfere with or obstruct the free navigation of the said river, as heretofore, by steamboats or other water craft, or the free use thereof, as heretofore, for the running, floating, guiding or sheering of loose logs, or rafts of lumber or logs, upon or down the same, or which shall directly or indirectly prevent, obstruct or interfere with the use of any slough, arm

or branch of the said river, as heretofore, for the holding, assorting or rafting of logs therein." Again, in the same volume, page 158, attached to an appropriation of \$10,000 for completing and protecting wing dams and jetties then in course of construction upon the Chippewa river, in and near its mouth, is this provision: "That nothing herein shall be construed, nor shall any expenditure of this appropriation be made, so as to affect existing legal or equitable rights in or upon the said Chippewa river or its branches, whether such rights arise under the laws of the United States or the state of Wisconsin."

The authority of congress under the constitution is the highest that can be exercised on this subject, and should be decisive. But if there were needed any further authority to show the lawfulness of the use of the Chippewa river by the public for the purpose of floating logs to the markets of the world, and to show the authority of the state, in the absence of congressional legislation, to authorize the improvement of the river by the building of dams, piers and booms, to facilitate that interest, we have it in the decision of the supreme court in the case of *Pound v. Turk*, already referred to, which says: "There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as cutlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interests of all concerned in the matter."

In the light of these precedents and statutory authorities, in connection with an extensive and uninterrupted usage coeval with the existence of the state, we do not hesitate to hold

that the use of the Chippewa river by the public as a highway for the transportation of logs and lumber is a right common to all, recognized and protected by the municipal law; and that such right must continue so long as the public have any need of its exercise, unless changed or abrogated by the legislature of the state or by congress. And there is no reason why it should not be so. It is the general commerce of the river which it is the object of the constitution and laws to keep inviolate.

Navigation proper, or, in its more limited sense, that is by steamboats, vessels, sloops, ships, barges, etc., is but a branch of commerce, which includes all these and much more, and, when navigable streams are best fitted for other branches of commerce, it is the true interest of the public to preserve them inviolate for the purposes to which they are best adapted. *Brig City of Erie v. Canfield*, 27 Mich. 479; *Moore v. Sanborne*, 2 Mich. 519; *Delaware & Hudson Canal Co. v. Lawrence*, 2 Hun, 163. Nor do I overlook the fact that it is alleged in the plaintiff's bill that the defendants have entered upon the business of cutting and running large quantities of pine logs without any authority for so doing in their charters. That allegation is more a conclusion of law than a statement of a fact; but considering it as an allegation of fact it makes the case no better; for the river is still a common highway for the floating of logs, open to all persons who have occasion to use it, and these companies, as against other individuals, would be entitled to the protection of the law applicable to all. And if the state did not complain it is difficult to see how an individual could.

Suppose a corporation organized under the state law for banking purposes engage in the business of farming or distilling, and use the common highways of the country for the purpose of carrying the products of the farm or distillery to market. Is there any doubt that the same law of the road would apply to it that applies to all? or would it be claimed that such corporation might be enjoined, at the suit of a private individual, from such a use of a common highway, because the business it had engaged in was *ultra vires*?

The case made by the bill against the defendant, the Chippewa River Improvement and Log Driving Company, is not more satisfactory than that against the other defendant. Organized and claiming authority under chapter 399 of the Laws of 1876, that company has built at immense cost, across the Chippewa, some 50 or 75 miles above steamboat navigation, a flooding dam, 16 feet high, with 32 gates, for the purpose of creating a reservoir of water to be kept and discharged as circumstances should require for the floating of logs, and, in using this dam, have so held back the waters of the river on two occasions as to injuriously affect the plaintiff in the running of his boats, by leaving them upon sand bars for the want of sufficient water to float them. This is the substance of the charge. It is true the plaintiff alleges that the act of 1876 does not confer any authority to float logs below the head of navigation, or in any manner to obstruct or interfere therewith, nor authorize any such unnatural stoppage of the water, and that if it were so construed it would be utterly void as against the laws of the United States and the constitution of Wisconsin. But this is a conclusion of law which adds nothing to the case made by the facts; and the facts alleged are not enough to entitle the plaintiff to the relief sought, which is the abatement of the dam as a nuisance, and a perpetual injunction against its further use, and the running of loose logs in the river.

The act under which the said defendant is organized empowers all companies incorporated for the purpose of driving, sorting and delivering logs on the rivers of this state and their tributaries, and for the improvement of such rivers and tributaries for such purpose, to improve any of such rivers and tributaries, or any part thereof, by clearing and strightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, necessary side, rolling and flooding dams, *or otherwise provided*, however, that such works of improvement shall not materially obstruct or impede navigation upon such rivers or tributaries.

This, it must be admitted, is very broad authority, and it is difficult to see why it does not in terms warrant the building

of such a dam as is complained of. I think it does. But, if there were any doubt on that point, the question should not be determined in a proceeding of this kind, as already shown, but the party should be first required to establish his right in a court of law. It is claimed that the statute was not intended to apply to the Chippewa river because the Chippewa river is a navigable stream, and that it is unconstitutional and unlawful to build dams or to float logs upon a navigable stream. But we think there is no room for such a distinction. The statute is framed in the most general terms, and was evidently intended to apply to all the lumbering streams of the state, whether navigable in any degree for boats or not; and such has been the general understanding and construction of the statute.

The complaint does not allege that the dam itself is an obstruction to navigation so as to bring the case within the proviso of this act, but only that the use of it in holding back the water of the river too long impedes and obstructs navigation in the river below Eau Claire, where, and where only, the river is navigable by boats. It is not claimed that the river is navigable for boats at Little Falls, where the dam is built, or between there and Eau Claire, on the river, some 60 or 75 miles below.

The practice of building these flooding dams on all the rivers and smaller streams in the lumbering portions of the state has become of late universal, and their beneficial use to the logging interest is immense. It is expressly authorized by statute, and would seem to be almost a public necessity, it being the only way in which much of the pine timber can be utilized or made available. That the use of these dams should in some instances injuriously affect navigation by boats could hardly be avoided, and must have been foreseen by the legislature. But it is peculiarly the province of legislation to determine whether or not their convenience and benefit to the logging interest and to general commerce would more than counter-balance the hindrance to steamboat navigation which their use would necessitate.

It is a proper subject of municipal regulation; and, where

the policy of the state is once made manifest by legislative acts, it is not in the province of a court of chancery, by its decrees, to run counter to that policy, and to declare that a nuisance, or the use of that a nuisance, which the law authorizes. If there be an abuse of the use of the thing so authorized by law, the law affords a remedy in damages; and that would be the appropriate remedy in this case if the law must be resorted to for a remedy. It does not follow, however, that, because the plaintiff has suffered damages in the passage of his boats by reason of the defendants' use of their dam, the plaintiff should be entitled to recover without any regard to other questions; such as the question whether, under all circumstances, the defendants have made an unreasonable use of the water, and how the beneficial use to the defendants of the water, in the manner charged, compared with the inconvenience which it caused to the plaintiff. Those are questions which would clearly be involved in the case, and it would be the province of the jury to determine them from all the facts and circumstances in evidence.

The logging business, the business of sawing lumber and running rafts, and that of navigation by boats, are all interests that have grown up together on the Chippewa, as also on some of the other lumbering streams in the north half of the state. They are all interests which the law recognizes, and they are all entitled to its protection. They are not and should not be regarded as antagonistic. On the contrary, they are more or less dependent one upon the others; and by a little mutual concession and forbearance, and a just and reasonable spirit on the part of those persons severally devoted to them, they may, undoubtedly, all flourish in themselves, and be a help to one another. Such a course in the long run will be found much more advantageous to the public, and to the parties especially concerned, than the engaging in litigation, the effect of which, if successful, would be to exterminate or cripple what some are apt to regard as a rival interest.

The demurrer must be sustained, and as the plaintiff does not desire to amend his bill of complaint it will be dismissed with costs.

*In re* STERLING, AHERNS & CO.*(District Court, D. Maryland. January 3, 1880.)*

**ACCOMMODATION NOTES—VENDOR AND VENDEE.**—Notes made by a vendee in excess of the value of the goods, and before the same have been delivered, for the convenience of the vendor, are accommodation notes, and the vendor is primarily liable for the same.

**SAME—BANKRUPTCY—CLAIMS—DIVIDENDS.**—The insolvent maker of such accommodation notes can only prove, against the estate of the bankrupt payee, the amount of the dividend actually paid by him on such notes.

In bankruptcy.

MORRIS, J. The bankrupts were merchants doing business in the city of Baltimore, and, prior to their failure, in August, 1875, were very largely engaged in importing sugar. They were also the agents of the Calvert Sugar Refining Company, a corporation largely engaged in refining sugar. Walter B. Brooks was elected assignee of the estate of the bankrupts, and about the same time the Calvert Sugar Refining Company, being also insolvent, executed a voluntary deed of assignment, for the benefit of its creditors, to Benjamin F. Newcomer and C. Morton Stewart. These trustees found that the promissory notes of the corporation, delivered by it to said bankrupts, and passed off by them, were outstanding to the amount of about \$1,700,000, and, upon an adjustment of the books in which were kept the accounts between said corporation and said bankrupts, it was found that the balance was largely against the bankrupts and in favor of the corporation.

It appears that the corporation had constantly required in its business a large amount of raw sugars, and that the bankrupts, who were importers of sugars, had been in the habit of importing with the intention of selling the cargoes to the corporation.

At or about the time of the arrival of every such cargo so sold to the corporation it would be entered as a purchase on its books, and the bankrupts would at once receive credit therefor and get the promissory notes of the corporation for the sugars at an agreed price in currency, duty paid; the

gross amount being subsequently corrected by proper entries in the books, if the weight was found to be more or less upon actual delivery, and if the price of gold should have changed when the duties came to be actually paid. The cargoes were not actually delivered until required by the superintendent of the refinery for manufacture, and were generally, at the time the promissory notes were given, in the custody of the United States government, in its bonded store-houses, subject to its lien for the duties, and also still pledged to the bankers for their advances upon the letters of credit with which the bankrupts had purchased the sugars in Cuba.

The bankrupts, as the agents of the corporation, kept its books of account, and received all the money paid by its customers for the refined sugars sold to them. Upon an adjustment of the books of account it was found that up to the time of the failure the bankrupts had received in money and promissory notes amounts largely in excess of the sums credited to them for the sugars they had sold to the corporation; this excess, as the account was first made up, being about \$655,000. Subsequently it was found that five cargoes of sugar, which had been sold by the bankrupts to the corporation, and for which they had been credited, and for which they had received the notes of the corporation, could not be obtained. They had been pledged by the bankrupts to Alex. Brown & Sons, the bankers, for their full value. The amounts credited to the bankrupts for these five cargoes being deducted, and other corrections being made, the account was made up as now presented, and it is this account, now amounting to \$1,027,794.94, which the trustees of the corporation are seeking to have allowed as a claim against the bankrupts' estate.

One item in this account is for the sum of about \$64,000, paid by said trustees, being dividends amounting to 50½ per cent. paid by them on a claim for about \$127,000, proved by Alex. Brown & Sons against the estate of the corporation for guarantees by the corporation of letters of credit issued by the bankers to the bankrupts.

The assignee of the bankrupts has petitioned the court not



to allow this account for the amount claimed, because they insist that, as for the transactions covered by the account, the bankrupts received from the corporation its promissory notes, amounting to \$1,716,000, which notes the corporation has not paid, and upon nearly all of which the bankrupts were liable as indorsers, and which have been proved as claims against the estate of said bankrupts. The trustees of the corporation should not be allowed to prove, for said amount claimed by them, beyond the amount of the dividends which has been paid on account of these notes out of the estate of the corporation.

Nearly all these promissory notes were indorsed by the bankrupts, and have been proved by the holders against their estate. Some of them, however, they did not indorse, but sold without recourse; and, as to others, they were pledged by the bankrupts as collateral security for loans made to them.

The trustees of the corporation, on the other hand, contend that as the bankrupts passed off for value, in one way or another, all these notes, *they operate as payment*, and so far as the account now to be adjusted between the corporation and the bankrupts is concerned they are to be treated as paid, because the bankrupts parted with them and got the proceeds of them, and the notes are now all out of their possession or control, in the hands of *bona fide* holders for value.

These facts have given rise to complications of rights and liabilities not easily settled, and both parties being insolvent, neither being able to perform their obligations or correct their mistakes, exact justice cannot be hoped for. All that remains possible is to endeavor to apply those rules and principles of law which have been established by decisions in similar cases.

One sound and well established rule applicable to the settlement of insolvent estates is that the estate must never pay two dividends in respect of the same claim. This rule was well illustrated and explained by the case cited in argument of the *Oriental Bank v. The European Bank*, reported in 7 L. R. (Chancery Appeals,) 99. In that case bills of exchange

drawn by one Constantinidi were accepted by the European Bank at the request of the Oriental Bank, and upon the undertaking of the Oriental Bank that it would provide funds to meet them at maturity. The bills were accepted by the European Bank under this arrangement, and, having been subsequently indorsed by the Oriental Bank, were discounted by the Agra Bank. Before the bills matured both the European and the Oriental Bank had stopped payment, and were being wound up by liquidators; the bills having been proved against both banks by the holder, the dividends received from both banks together just paid them in full, and the liquidators of the European Bank sought to prove against the estate of the Oriental Bank for the amount which it had been compelled to pay through its breach of the contract to provide funds to meet the bills at maturity.

In deciding the case Lord Justice Sir George Mellish, reversing the decision of Vice Chancellor Bacon, said: "It is quite obvious that if this proof is allowed the Oriental Bank will pay a double dividend on the same debt. It appears to me clearly that it is substantially the same debt, because, if all parties had been solvent, whatever sums the Oriental Bank might have paid to the Agra Bank, although they would have paid it, no doubt, for the purpose of performing the contract they had entered into by their indorsement, yet, substantially, whatever sums they might have paid to the Agra Bank would have gone in reduction of the sum which the Oriental Bank had promised to pay to the European Bank. In that case the Oriental Bank could never have been called upon to pay these bills twice over. It would have made no difference that they had entered into two contracts with two separate parties that they would pay the bills, namely, with the European Bank as acceptors, and with the Agra Bank as holders. It is clear that they would have performed both contracts by paying the bills once. \* \* \* \* It has been the law for a great number of years, with reference to proofs in bankruptcy, that if an acceptor accepts bills for the accommodation of the drawer, and the drawer enters into a contract,

express or implied, (and I do not think there is any difference between the two,) that he will provide for the bills when they become due, and then the drawer becomes bankrupt, there cannot be a double proof against his estate, namely, one proof by the holder of the bill, and the other proof by the acceptor of the bill on the contract of indemnity. \* \* \* \* The principle itself—that an insolvent estate, whether wound up in chancery or in bankruptcy, ought not to pay two dividends in respect of the same debt—appears to me to be a perfectly sound principle. If it were not so a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principle is that there shall only be one dividend in respect of what is in substance the same debt, although there may be two separate contracts.” (pp.102-103.)

In the case now before me, from the course of dealing between the Calvert Sugar Refining Company and the bankrupts, it would appear that in advance of the delivery of the cargoes of sugars, and upon an estimate of their quantities, subject to correction when actually delivered, and subject to other adjustments of cost, the corporation was in the habit of handing over to the bankrupts its notes in round amounts, intended to be about equal to the price of the sugars. It is obvious that this was done for the accommodation and convenience of the bankrupts, for the sugars were frequently not delivered until a considerable period afterwards, and were at the time still liable for the duties and under pledge to the bankers. When it so happened that the bankrupts were unable to deliver the sugars, it would seem that the primary obligation resting upon them was to return all the promissory notes received by them for which they had not delivered sugars. This they would not have been able to do, because they had passed the notes off and they were out of their possession and control. It then, as it seems to me, became their duty to pay the notes when they matured, for the purpose of

relieving the corporation from all liability in respect to them. Practically, then, these notes, it seems to me, became of the nature of accommodation paper, as to which the bankrupts were first bound to see them paid, and as to which the corporation stood in the attitude of *sureties*.

*If the bankrupts had continued solvent and paid the notes*, the corporation would have had no claim against them except, perhaps, for a possible damage arising out of the increased price they might have had to pay to replace the sugars; but no such element of damage is suggested as having actually occurred, so that by paying the notes the bankrupts would have satisfied the whole claim against them.

*If the corporation had continued solvent* after the bankrupts failed it would have had to pay their notes to the holders, and having paid them one of two courses would have been open to it. It could have proved a claim against the bankrupts' estate for the value of the undelivered sugars, or, if the notes are treated as accommodation paper, it could have proved the notes; but it could not do both. It could not possibly be allowed to prove against the bankrupts for both the value of the sugars and for the notes.

The corporation having failed before the maturity of the notes it did not pay them, and it does *not, itself*, prove them against the bankrupts, but the *holders* do; and to allow the claim now presented would, it appears to me, be allowing the same debt to be twice proved against the bankrupts, namely, once by the holders of the notes, and a second time by the corporation in their claim for the undelivered sugars.

With regard to the law applicable to this case it is further to be observed that if obligations are *proved in full* against the estate of the party primarily liable they cannot be proved again by the surety, even for the amount he or his estate has been obliged to pay. But if they are not proved in full, but before proof the amount received by the holder from the estate of the surety is first credited, then the surety is entitled to prove for the amount he has paid.

In this case the holders of all the notes, having received

from the trustees of the Calvert Sugar Refining Company dividends amounting to 50½ per cent., which are credited upon their claims, they will receive from the bankrupt estate dividends only upon the balance of their claims, and the letters of credit, upon which the trustees have paid similar dividends as guarantors, have not as yet been proved against the bankrupt estate at all.

It therefore appears to me that the trustees are entitled to prove for the sum of \$64,398.52, which they have paid as guarantors upon the above mentioned letters of credit, and that upon an adjustment of the account between the corporation and the bankrupts the balance in favor of the corporation will represent the amount of promissory notes which the bankrupts availed themselves of in excess of the amount to which they were actually entitled, and which, in the view I have taken of the transaction, are to be regarded as of the nature of accommodation notes, and as to which, therefore, the corporation, standing in the attitude of surety, is entitled to prove for the amount actually paid by it; that is to say, for 50½ per cent. of the said balance.

This is the conclusion I have reached after a careful consideration of the facts and of the cases cited, aided by the very able arguments of counsel, and it has not seemed to me that it would subserve any useful purpose for me to attempt in mere detail to state the reasons why I have not been able to adopt as applicable to this case other principles of law which were forcibly argued and pressed upon the court, but in which I have been unable to find a satisfactory solution of the very great difficulties of the case.

## TOOHEY v. HARDING.

(Circuit Court, D. Maryland. February 28, 1880.)

**INVENTION—CLAIM—PATENT.**—A patent only protects that part of an invention which the patentee sets out in his claim.

**CONFLICTING INVENTIONS—COMMON PURPOSE OF TWO INVENTIONS.**—The manufacture of a machine in accordance with a patent, without infringement of the claim of another patentee, cannot be restrained, although the machine incidentally accomplishes the purpose of the prior invention of such other patentee.

**PATENT-OFFICE—EVIDENCE.**—Certain certified copies of certain papers from the files of the patent-office, not purporting to be anything in the nature of a record, *held* admissible in evidence, in proof of facts pertinent to the issue.

Bill in equity to restrain infringement of patent.

MORRIS, J. The bill alleges that complainant is the inventor of an improvement in plaiting machines, whereby the case-board was provided with a removable strip, in combination with rods having heads, for which a patent, No. 192,098, was granted to her on June 19, 1877, in pursuance of her application therefor, dated May 25, 1876; that respondent's patent does not have, and does not pretend to have, that which is the peculiar feature of the invention of the complainant, to-wit: the removable strip in combination with the case-board, and plaiting rods having heads, as in her patent described; that respondent is making and vending machines containing the improvements and inventions of complainant, and, under color of his own patent, making machines having the inventions of complainant incorporated therewith.

Respondent, in his answer, alleges that he is manufacturing plaiting boards not in violation of complainant's rights, but under his own patent, No. 186,246, issued to him on January 16, 1877, in pursuance of his application therefor, made May 27, 1876; he having previously filed, on May 2, 1876, a caveat relating to his said patent. He denies that his machines have, or pretend to have, the peculiar feature of complainant's invention, but alleges that they are made strictly in accordance with his own patent, and are substan-

tially and materially different from the machines described in complainant's patent, and not an infringement thereof.

Upon an inspection of complainant's patent it appears that what she claims as her invention is the combination, in a plaiting board, of rods provided with heads, with a removable strip, by means of which all the rods can be withdrawn at once without loss of time, or disturbing the plaits, by simply detaching the strip. Her claim is confined to this.

The respondent claims, as his invention, a plaiting board made in sections, detachable one from the other, provided on the under side with dovetail grooves, to receive dovetail bars let into the main portion of the board; the purpose being to furnish a plaiting board capable of being easily made wider or narrower by adding strips, as might be needed, for goods of various widths.

He also claimed a peculiar method of fastening and unfastening the pins different from the complainant's method, the pins being the ordinary knitting needles, and without heads.

The testimony and exhibits satisfactorily show that each patentee is manufacturing in accordance with his and her own patent, and there does not appear to be any infringement, unless the patent of respondent, whose application was filed two days later than complainant's, is an interference with the patent granted to the complainant; that is to say, unless the invention claimed by the respondent is the same in whole or in part as that claimed by the complainant.

In considering this question it is to be noticed that no such interference is asserted by the complainant. She does not assail his patent and ask to have it, or any part of it, annulled, but her complaint is that respondent, notwithstanding the patent granted to him does not contain the peculiar invention of her patent, has incorporated her invention into the machines which, under color of his patent, he is manufacturing.

The rule of construction is that each patentee is restricted to the matters set out in his claim. The claim of the complainant is for rods with heads, in combination with a remova-

ble strip, and nothing more. The object to be accomplished was removing the rods without loss of time. The means were the headed rods, which were so arranged as to be all drawn out at once by pulling off the removable strip.

It is true that in her specifications she says that the width of the board may be increased at will, by adding a strip to one of the edges, but that is not part of the invention which she claims as hers, and which she is to be protected in. She is, therefore, without ground to complain of the infringement of anything except the combination of the headed rods with the removable strip.

There is no evidence that the respondent uses, or suggests to his purchasers that they shall use, headed rods, or that his object in making his board in the manner he does is other than the purpose set forth in the specifications of his patent, viz.: to enable the width to be enlarged or diminished. He uses, also, his own device for holding the rods on to the board. There is no evidence to show that the boards made by the respondent do, in fact, when used, accomplish the result proposed to be accomplished by the complainant's invention. It was suggested in argument that, as the respondent's board was made with a detachable strip, when the strip was removed, and the board tilted over and slightly shaken, the rods would all fall out, thus accomplishing the same result as when the headed rods were all forcibly drawn out by removing the strip in complainant's board. If this be in fact so, it is a result for which I cannot see that complainant has any remedy. The respondent has a right to manufacture in accordance with his patent, and if by so doing, and without infringing the claim of complainant, he produces a machine which incidentally, and without use of her invention, accomplishes the useful purpose of her invention, he may do so.

I have come to these conclusions without considering the evidence submitted by the respondent and excepted to by the complainant.

The certificate of the patent-office that the respondent filed



a caveat for a plaiting device on May 2, 1876, cannot be considered, as there is nothing to show what the device was.

The testimony of Charles B. Mann is not admissible for the reason that he is not an expert in the matter concerning which he gives an opinion. Objection is made to the admissibility of certified copies of certain papers from the files of the patent-office relating to the complainant's patent, upon the ground that these documents do not profess to be, and are not, a perfect or complete record of the matters to which they refer.

These certified copies purport to be: *First*, a copy of complainant's application, specifications and claim as first filed in the patent-office; *second*, a copy of a letter to her from the patent-office notifying her that her application was found to interfere with respondent's application, and that the subject-matter of the interference was "a plaiting board made in detachable sections, to permit of the plaiting machine being adjusted at different widths;" *third*, a copy of a paper by which she waived an appeal from the decision of the examiner of interferences; *fourth*, a copy of a communication dated June 9, 1877, addressed by her to the commissioner of patents, directing him to amend her claim by omitting the claim for the board adjustable for different widths, and leaving only the claim as we find it in the patent granted to her.

I think these papers are properly before the court. They do not profess to be anything in the nature of a record, but simply perfect transcripts of certain documents now on file in the patent-office. They tend to show that the complainant did originally, in her application, claim as her invention a removable strip for widening the plaiting board; that upon being notified that, in the opinion of the examiner of interferences, the claim made by her interfered with respondent's application, she waived an appeal and struck out that claim from her application.

These were facts pertinent to the issue, and which the respondent was entitled to prove by the best evidence he could procure. If they are not all the facts in connection

with the matter, no one knows it better than the complainant, and no one was better able than she to bring to the attention of the court any other documents of or facts tending in any way to explain them.

Without this documentary evidence, there being no evidence as to priority of invention or want of novelty, it would have been the duty of the court to restrain both patents, unless they were conflicting and both covered the same invention, and without it I should have sustained them. But this evidence serves to confirm that opinion, and shows very clearly how it occurs that in the specifications of complainant's patent there is a mention of the contrivance for widening the board which does not appear when she states what she claims as her invention, and also explains why it is that complainant does not attempt to assert that she is entitled to have the respondent's patent annulled as an interference with hers.

I will sign a decree dismissing the bill.

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VON LINGEN and others *v.* DAVIDSON and others.

DAVIDSON and others *v.* VON LINGEN and others.

(*District Court, D. Maryland.* March 6, 1880.)

CHARTER PARTY—"ABOUT TO SAIL."—The words "about to sail from Benizaf with cargo for Philadelphia," contained in a charter-party, *held* to mean, under the circumstances of this case, to sail as soon as with reasonable diligence a cargo could be got on board.

SAME—"EVERY WAY FITTED FOR THE VOYAGE."—The stoppage of a steamer for five hours at a port in the course of her voyage, for the purpose of taking in a small quantity of additional coal, *held*, under the circumstances of this case, to be no breach of a provision in the charter-party that such steamer was "in every way fitted for the voyage."

In admiralty.

These are cross libels filed by the charterers and owners of the British steamer "Whickham."

The British steamer "Whickham," belonging to T. H. Da-

vidson and others, citizens of Great Britain, as appears from the log-book, sailed from Shields on July 9, 1879, with a cargo for Lisbon, arriving there on July 16th. She discharged her cargo and sailed thence in ballast on July 23d for Benizaf, on the coast of Morocco, under charter for a cargo of iron ore. She passed through the Straits of Gibraltar on July 25th, and at 4:30 p. m. on Saturday, July 26th, came to anchor in Benizaf Bay. On Monday, July 28th, she began taking in her cargo of iron ore, and continued taking it in from day to day, and finished at 5:30 p. m. on August 7th, got under way at 6:30 p. m., and sailed for Philadelphia. She stopped some five hours at Gibraltar, on August 9th, for coal, and, taking in 45 tons of coal, had a prosperous voyage, arriving at Philadelphia on September 2d.

Messrs. Gregg & Co., ship-brokers of Philadelphia, were, about August 1st, authorized, by cable message from the owners in England, to procure for the "Whickham" a charter to carry grain from the United States on her return voyage, and they, not finding a desirable charter for her in Philadelphia, authorized Mr. Eareckson, a ship-broker in Baltimore, to look for a charter for her in that city. Mr. Eareckson's authority was by telegraph, and represented the vessel as sailed, "or about to sail," from Benizaf. Messrs. Schumacher & Co., of Baltimore, being under contract to ship a large cargo of grain by steamer during the month of August, had employed Mr. Ford, of Baltimore, a ship-broker, to procure for them a suitable steamer, and he finding steamers for August very scarce, and hearing of the "Whickham," took Mr. Eareckson to the office of Schumacher & Co., and suggested that the "Whickham" would answer their purpose. Schumacher & Co. doubted if the steamer would arrive in time, and explained that, unless they could load and clear the vessel within the month of August, she would be of no use whatever to them. Mr. Eareckson, however, made a calculation to show that the steamer would arrive in time, and Schumacher & Co. agreed to take her. *This was on August 1st.*

A charter-party was prepared by Messrs. Gregg & Co., of Philadelphia, and signed on behalf of the owners, and sent to

Schumacher & Co., but they refused it as it, contained the words "sailed or loading at Benizaf," which they claimed was not the agreement. Another charter-party was then executed by Gregg & Co. containing the words "sailed or about to sail from Benizaf," which was accepted and agreed by Schumacher & Co., and that is the contract under which this controversy arises.

It appears that during the negotiation Schumacher & Co. endeavored to get a stipulation inserted in the charter-party that the vessel would arrive in time for the August shipment, but that was refused. It also appears that in the printed charter-party used there was a stipulation in this language: "Charterers to have the option of cancelling this charter-party should vessel not have arrived at loading port prior to ———." This was erased by drawing a pen through it.

The portions of the charter-party material to this litigation were as follows:

PHILADELPHIA, August 1, 1879.

"It is this day mutually agreed between T. H. Davidson, Esq., owner of the British steamship 'Whickham,' of London, built 1876, at Newcastle, of 1124 net tons register, or thereabouts, classed 100 A. 1 in British Lloyds, *now sailed or about to sail from Benizaf with cargo for Philadelphia*, and Messrs. A. Schumacher & Co., that said steamship being tight, staunch and strong, and in every way fitted for the voyage, with liberty to take outward cargo to Philadelphia for owner's benefit, shall, with all convenient speed, sail and proceed to Philadelphia or Baltimore, at charterer's option, after discharge of inward cargo at Philadelphia, and there load from said charterers, or their agents, a full and complete cargo of grain, etc., etc., and being so loaded shall therewith proceed to Queenstown, Falmouth or Plymouth, for orders to discharge at a safe port in the United Kingdom, etc., and deliver the same on being paid freight, six shillings and three pence sterling per quarter of 480 lbs., etc., in full of port charges, etc., (the acts of God, restraints of princes and rulers, the dangers of the seas and navigation, accidents to boilers, machinery, etc., always excepted.) Fifteen running days, (if vessel not

sooner dispatched,) commencing when vessel is all ready and prepared to receive cargo, and written notice thereof given to charterers, to be allowed for loading and discharging vessel, and if longer detained charterers to pay demurrage at the rate of 40 pounds British sterling, or its equivalent, per day. Penalty for non-performance of this agreement, estimated amount of freight."

It further appears from the testimony that on the eighth day of August Schumacher & Co., having become uneasy about the "Whickham," got Gregg & Co. to send a cable message to the owners for information, and on the ninth day of August, learning that she had just that day passed Gibraltar, they concluded that she would not arrive in time for their purpose, and determined to look for another vessel, and on the sixteenth day of August chartered another steamer, at an advance of nine pence a quarter, she being the only other steamer which could be obtained suitable for the purpose.

The "Whickham," arriving in Philadelphia on September 2d, discharged her cargo of iron ore with dispatch, and sailed for Baltimore on the 7th, arrived in Baltimore on the 9th, where she was tendered to Schumacher & Co. on September 11th. Schumacher & Co. refused to load her, and filed their libel *in personam* against the owners, for their damages in being obliged to charter another vessel at a higher rate, alleging that the "Whickham," at the date of the charter-party, had not sailed nor was she about to sail from Benizaf, and that by reason of the breach in said contract and warranty, and the delay in the arrival of the steamer at Philadelphia arising therefrom, they were not afforded an opportunity of loading said steamer with grain, either in Philadelphia or Baltimore, during the month of August, whereby they had sustained \$2,000 damages.

The owners of the "Whickham" answered, and also filed their cross-libel, alleging that on the day of the date of said charter the steamer *was* about to sail from Benizaf, and did proceed with all convenient speed to Philadelphia, and having discharged her inward cargo did, in accordance with said charter, proceed to Baltimore and was ready to receive cargo

from the charterers, (of which written notice was given to them,) but that the charterers had, without cause, repudiated the charter and refused to load said vessel; that said steamer, as soon as possible after said refusal, was re-chartered at the risk of said charterers, at the best rate that could be had, and that finding that a better charter could be obtained in New York than elsewhere, she took a charter from that port at a loss in freight of \$1,912.58; and that she lost by the increased expenses and loss of time, and expenses at New York, \$1,000 additional, so that the whole loss of the owners was upwards of \$3,000.

Obviously the solution of this controversy, involving so considerable a loss to both parties, depends upon the interpretation of the words "about to sail from Benizaf with cargo for Philadelphia."

It is claimed that in interpreting the meaning of these words the court is to give weight to the facts stated by the charterers in the negotiations preceding the signing of the charter party, and particularly to the fact then made known by Schumaker & Co. to the agent of the owners, that unless the steamer arrived in time for the August shipment the object they had in chartering the vessel would be entirely frustrated; that time was to them of the very essence of the whole contract, as they understood it, and that this they fully explained to the agent of the owners; and as, by reason of the non-arrival of the steamer during August, their object was frustrated, the court should put upon the words "about to sail" a stricter interpretation than in a case where, notwithstanding the non-arrival of a vessel within the expected time, the purposes of the charterer might still be practicable.

This doctrine is fully considered by the supreme court of the United States in the case of *Lober v. Bangs*, 2 Wall. 728-736, and the conclusion announced by the majority of the court is that the frustration of the purposes of the charterers cannot affect the construction of the contract, but that the contract is to be construed with reference to the intention of the parties at the time it is made, without reference to subsequent events, the intention of the parties being derived from the

*language of the instrument*, and that, when the meaning of the language is not clear, the court is to construe it in the light of the circumstances surrounding the parties when the contract was made.

With regard to the *facts* of this case, although it does not appear distinctly in the testimony, it was stated in argument, and seems to be a conceded and generally known fact, that Benizaf is a loading place on the coast of Morocco, about 24 hours, by steamer, from Gibraltar, from whence is shipped iron ore. It is not a port or harbor, but simply a convenient loading place for shipping the iron ore mined in that vicinity. It is not unfair, therefore, to presume that any one contracting with regard to a vessel at Benizaf knew for what purpose she was there, and the nature of the cargo she was there to take in; and when Schumacher & Co. negotiated and contracted with regard to a steamer about to sail from Benizaf with cargo, they must be presumed to have known that she was there taking in a cargo of iron ore, in the usual manner in which cargo is taken in at that place.

There is no proof of any usage among ship-owners and charterers by which any peculiar meaning is given to the words used in the charter. There is no proof, indeed, as to what period of time the charterers themselves, when making the contract, thought the words "about to sail" should cover.

For the purposes of this contract I think the court must take the words themselves, and determine their meaning with reference to such a vessel as the "Whickham," when at Benizaf, under the circumstances as known to both parties.

The words "about to sail" had reference primarily to the steamer's leaving Benizaf, and indirectly only to the time of her arriving in Philadelphia; and it is to the circumstances surrounding her at Benizaf that we are to look for light, and not to the expectations of the charterers as to her arrival at Philadelphia. The words used in the contract were the words which it was known to all the parties the agent of the owners was authorized by them to use, and it is plain that the necessity of the charterers to have the steamer in time for the

August shipment of grain cannot affect the meaning to be given to the language.

It is apparent that the words "about to sail from Benizaf with cargo" must have been understood to cover some period of time. It would not be reasonable to suppose the charterers ever thought they meant that the ship had all her cargo on board and was weighing anchor, or getting up steam, or was in any such state of forwardness as that she could leave Benizaf within an hour or two. It is not reasonable to suppose that the owners were willing to bind themselves, with regard to a vessel in so remote and inaccessible a place, to such a point of time. It must, I think, have been understood by the charterers that some delay in the departure of the vessel was covered by the language.

Gibraltar appears to be the nearest point of telegraphic communication. Neither the owners nor charterers could know anything of the "Whickham" except that she passed in through the Straits of Gibraltar on July 25th. It was to be presumed, on August 1st, that she had reached Benizaf, and had been there five days, and therefore had either sailed for Philadelphia, or was about to sail as soon as she got her cargo on board, which was the only thing to detain her.

As matter of fact she had for two days been receiving cargo. She was ready to receive it on Sunday, July 27th, but received none on that day; on Monday, 28th, she did take in about 115 tons, and on Tuesday, the 29th, about 90 tons; on the 30th she received none, and 31st only four boat loads. The process of loading at Benizaf is proved to be that the vessel lies at anchor about a quarter of a mile from the coast, in the roads. Small boats, carrying from five to seven tons each, come along-side, and the ore is passed up the ship's side in small baskets, of about fifteen to the ton. There are two or three stages from the boats to the ship's decks, and two men at each stage receiving and passing the basket. It is proved that there were two gangs of men on each side of each of four hatches, so that there were about eight boats along-side at one time unloading into the ship.

The ship's officers swear that the cargo was taken in with



diligence and dispatch; that at first there was some delay resulting from there being two other steamers ahead of them, who had the right to be first loaded, and for the first three days the "Whickham" was more or less interfered with, and the witnesses testify that the delay in all may have resulted in a loss of about two days' time. They state that the "Whickham" had steam up for several hours before the loading was completed, and that she sailed within an hour and a half after the last basket of ore was taken on board.

What do these facts show with regard to the surroundings of the steamer at the date of the charter, and what assistance do they afford us in getting at the meaning of the statement that the steamer was then "about to sail from Benizaf with cargo for Philadelphia?"

They show that the steamer was to bring the usual cargo from that place, and that it was being put on board in the usual manner; that she had been at the place five days. They show that she had not then sailed, because she had not completed taking in her cargo; but that she did complete taking in her cargo with reasonable diligence, and, being in every respect fitted for the voyage, did, as soon as her cargo was on board, proceed with all convenient speed to Philadelphia. Either I must hold that "about to sail with cargo" meant that the steamer had her cargo all on board, and had nothing left to be done but to get up her anchor and start, which is an unreasonable and strained interpretation of such words in a contract with reference to a vessel in so remote a place; or I must hold that they meant that she would sail in 12 hours, or in 24 or 48 hours, or some other definite time after the signing of the charter-party, which would be making for the contracting parties a contract which they did not themselves make; or I must look at the known employment of the steamer at the date of the contract, and hold that the words meant that, as loading her cargo was the only thing which could be supposed to be detaining her at that place, she was to sail as soon as, with reasonable diligence, she could get her cargo on board; and this, I am of opinion, is the proper interpretation of the contract. The word "about" can only be

construed with reference to the subject-matter and circumstances with regard to which it is used; it has a more uncertain meaning than the words "almost," "nearly," "well nigh;" and, unless I adopt the method last above indicated, I think we are entirely without any guide in ascertaining its meaning as used in this charter, and what was the intention of the parties expressed by it.

It plainly appears from the contract that the charterers took a great many risks, in respect to the steamer arriving in time for their purpose, which they would not have taken if they could have obtained the stipulation which they tried to get from the owners, but could not, viz., a stipulation that they were to be released if the steamer did not arrive in time for the August shipment. They were refused that stipulation, and they took the charter without it, and assumed all the risks of her non-arrival by reason of the weather and the accidents of navigation, which always rest upon the charterer unless there is a stipulation that the vessel shall arrive by a particular day.

There are, in the reports, numerous decisions in which long delays, even extending to one and two years, arising from embargoes or perils of the sea, have been held not to absolve the charterer from loading the vessel when finally tendered. There is no argument, therefore, to be adduced from the alleged hardship of the case. In dealing with contracts with regard to vessels there must frequently be great losses arising from delays for which neither owner nor charterer is to blame. Upon whom that loss must fall must be determined by the contract; and, as was said in *Dimeck v. Collett*, 12 Moore's Privy Counsel Cases, 228, "if the parties have not expressly stated for themselves in the charter-party that unless the vessel sailed by a specified day the charter-party should be at an end, the court ought to be slow to make such a stipulation for them."

I have examined with care the decisions which were cited by counsel, but I have not been able to find that in any case at all similar to the one under consideration, and in which no particular day or period of time was stipulated for the sailing

or the arrival of the vessel, the charterer was held to be absolved.

It was also urged on behalf of Schumacher & Co. that, as the charter-party represented that the steamer was in every way fitted for the voyage, it was a breach of the contract for her to stop at Gibraltar for coal. By the ship's log it appears that her stop there did not exceed *five* hours, and was solely for the purpose of taking in a small additional quantity of coal. Gibraltar was not out of her course; she must of necessity pass in proximity to it—it is a well-known coaling station for steamers—and I think it entirely too harsh a construction to hold that a steamer stopping so short a time and under such circumstances is a deviation, and was not proceeding with all convenient speed to Philadelphia.

The conclusion to which I have arrived is that Schumacher & Co. were not released from their obligation to load the vessel when she was tendered to them, and that they are liable to the owners for the damages resulting from their refusal so to do.

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#### THE FIRST NATIONAL BANK OF UNIONTOWN v. STAUFFER.

(Circuit Court, W. D. Pennsylvania. February 13, 1880.)

NATIONAL BANK—USURY—REV. ST. § 5198.—The receipt by a national bank of an usurious rate of interest upon the discount of a note works a forfeiture of such interest as would otherwise have accrued after the maturity of the note.

Motion for a new trial in an action upon a promissory note against an accommodation indorser.

*J. M. Stoner*, for plaintiff.

*T. C. Lazear*, for defendant.

McKENNAN, J. This case was tried before the late Judge Ketcham, and, under his instructions, a verdict was rendered in favor of the plaintiff for the amount of the note in suit, with interest from its maturity to the date of the verdict. A motion for a new trial was made by the defendant, for the

reason that, under the circumstances, no interest was recoverable upon the note, and that it was error in the judge to instruct the jury otherwise.

It is admitted that more than the legal rate of interest was charged and received by the plaintiff for the period which elapsed between the date and maturity of the note, and the question is whether this subjects the plaintiff to a forfeiture of the interest which accrued afterwards.

The National Currency Act furnishes a clear answer to this question. After fixing the rate of interest to be taken by national banks at that allowed by the local law, the thirtieth section of that act (Rev. St. § 5198) enacts: "And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged to be a forfeiture of the *entire* interest which the note, bill or other evidence of debt *carries with it*, or which has been agreed to be paid thereon;" and it is further provided that, where excessive interest has been paid, *twice* the amount may be recovered by an action commenced within two years.

The "*entire*" interest which the note "carries with it" is forfeited; and, if this means *all* the interest which accrues upon it, as I think it clearly does, it is difficult to understand how any part of it is recoverable. By the operation of the act an usurious contract is inherently vicious, so that it cannot "carry" any interest "with it;" hence it would inadequately effectuate the intent of the act to hold that such a contract is purged of its taint and is invested with a capacity denied to it before by the failure of the debtor to pay the debt, evidenced by it at maturity.

This view of the effect of the act of congress is not inconsistent with the opinion of the court in *Barnet v. The Nat. Bank*, 8 Otto, 555, as was urged in the argument, but is in entire harmony with it. There it was sought to set off usurious interest paid upon a series of renewed bills, and also twice the amount of such interest, and it was held that the only remedy of the debtor was a penal action, as provided by the last clause of section 30. In expounding this section the

court say: "Two categories are thus defined, and the consequences denounced:

"1. Where illegal interest has been knowingly stipulated for, but not paid, then only the sum lent, without interest, can be recovered.

"2. Where such illegal interest has been paid, then twice the amount so paid can be recovered, in a penal action of debt or suit in the nature of such action against the offending bank. \* \* \* \*"

It is thus declared that the effect of a mere stipulation for illegal interest by a national bank is to deprive it of the right to recover more than "the sum lent, without interest;" but surely the "receiving" of illegal interest in furtherance of a stipulation to that effect cannot place the bank upon any better footing. It will undoubtedly preclude the recovery, by the debtor, of the penalty for an usurious payment, by way of set-off against his debt, but it cannot invest the creditor with a right to recover what the law declares he shall forfeit by reason of his unlawful agreement.

In this case it was agreed that usurious interest should be paid, and was paid, to the plaintiff, and the jury should have been instructed that this worked a forfeiture of all the interest upon the note, and that the plaintiff was entitled to recover only its face amount. A new trial will, therefore, be ordered, unless the plaintiff, within ten days, shall remit the excess of the amount found by the jury on the principal of the debt. Upon the entry of such remitter judgment will be entered on the verdict for the amount so rendered.

THE FIFTH NATIONAL BANK OF PITTSBURGH v. THE PITTSBURGH & CASTLE SHANNON RAILROAD CO.

(District Court, W. D. Pennsylvania. February 18, 1880.)

STOCKHOLDERS—BOARD OF DIRECTORS—PETITION—RECEIVER.—The stockholders of a defendant corporation cannot obtain the removal of a receiver by petition, where it appears from the pleadings that such corporation has a regularly elected board of directors, and that such board is in active sympathy with the petitioners.

NATIONAL BANK—RECEIVER—DISTRICT COURT—JURISDICTION.—A district court of the United States has jurisdiction of a bill in equity praying for the appointment of a receiver of an insolvent corporation, filed by a national bank established within the district within which such court is held.

Petition by alleged majority of the defendant stockholders.  
*S. Schoyer, Jr.*, for petitioners.

*D. T. Watson and Knox & Reed*, for the receiver and defendant company.

*Hampton & Dalzell*, for *H. Sellers McKee*.

*Slagle & Wiley*, for the Iron City National Bank.

ACHESON, J. The parties to this suit are the Fifth National Bank of Pittsburgh, plaintiff, and the Pittsburgh & Castle Shannon Railroad Company and George R. Duncan, trustee of certain mortgage bondholders, defendants.

Certain stockholders of the corporation defendant, claiming to represent a majority of the stock, filed a petition in the case, containing various prayers, only two of which are now pressed, viz.: (1) that *W. W. Martin* be removed from the receivership of the defendant company, and *James M. Bailey* appointed in his stead; (2) that the Iron City National Bank and *Sellers McKee*, judgment creditors of the defendant corporation, be restrained from proceeding by execution against the corporation.

At first I was disposed to regard the petition in the light of a cross-bill; but, upon a careful examination, I find it lacks the essential elements of such bill. Upon the pleadings as they now stand the petitioners are strangers to this case, and

have no right to relief in the manner proposed, even had they shown good ground therefor. I reach this conclusion with the less hesitation because it appears, from the affidavits read, that the petitioners now have in active sympathy and co-operation with them a majority of the board of directors, and, of course, have it in their power to control the corporation and be heard in court through it.

I might here stop with a simple order dismissing the petition, but the case is so peculiar that I feel called on to add some additional observations.

It was said by counsel for one of the judgment creditors that the court should itself take notice that the case is one not within the jurisdiction of the court. But I do not agree with the counsel upon the question of jurisdiction. By section 563 of the Revised Statutes the United States district courts have jurisdiction, *inter alia*, "of all suits by or against any association established under any law providing for national banking associations within the district within which the court is held."

But while of opinion that the controversy is within the jurisdiction of this court, I am very sure a receiver of the defendant corporation would never have been appointed had the court been in possession of all the facts which have been developed upon the present hearing. It is now plain that the rights of the plaintiff were not of such a character and were not in such jeopardy as to call for a remedy so extraordinary as the appointment of a receiver. Had any opposition been made by the defendants, clearly the court would have refused such appointment. In fact, it now for the first time appears that the corporation defendant acquiesced in, if it did not secretly promote, the appointment of a receiver in its own interests. This was not apparent to the court when the appointment was made.

At that time there was a contest for the office of receivership between the stockholders, some favoring Mr. Martin, others Mr. Bailey. The former was appointed. I do not find he has been guilty of any act of commission or omission since his appointment calling for his removal for cause.

No one having a proper standing in court has asked the court to rescind the order appointing a receiver, and I do not think the court of its own motion is called upon to make such order.

But creditors of the corporation will no longer be hindered in bringing suits or proceeding by execution against it. Leave will be and is hereby granted to them to proceed by suit and execution.

This permission, however, is subject to a qualification in the case of M. B. Thompson, Jane Reamer, Minerva H. Rahausser, Jane Redman and Margaret Reamer. These parties proceeded in the common pleas court, No. 2, against the Pittsburgh & Castle Shannon Railroad Company and the receiver, by an action of ejectment, in clear contempt of the authority of this court. A subsequent application was made to this court to sustain that suit, but this was refused. I have been asked to reconsider the action of the court in this regard, and I was, at first, disposed to do so; but upon reflection I have concluded not to disturb the former order of the court. But leave is now granted to said parties to bring and prosecute to judgment and execution a new action of ejectment, or such other suits as may be appropriate to their case.

Petition dismissed.



## MACK and others v. LANCASHIRE INS. Co.

*(Circuit Court, E. D. Missouri. —, 1880.)*

**PLEADING—ANSWER—GENERAL DENIAL.**—Under the rules of pleading established by the state of Missouri, as modified by the act of 1875, affirmative matters of defence cannot be set up under a general denial.

Demurrer to answer.

*Noble & Orrick*, for plaintiffs.

*O. B. Sansum and B. Gratz Brown*, for defendant.

**TREAT, J., (orally.)** There is a demurrer to the second count of the answer. In the course of the argument I directed the attention of counsel to a great many matters, not because this case involved all of the inquiries suggested, but to get their assistance in order that I might settle, as far as is practicable, in my own mind, the rules of pleading under the statute of the state. I should like to write an opinion as to the effect of the state act of 1875, but I think I can state my views intelligibly. Here is an action under a fire policy containing many provisions. The only point under consideration is, how must the pleadings in this case, under the rules of pleading established by the state, as modified by the act of 1875, be made up? The plaintiffs here aver a contract under the terms of which they, having done certain things, are entitled to recover. There are warranties and other matters contained in the policy which constitute substantive matters of defence, and which the party can set up, whereby he can defeat the right of recovery. How shall those matters be set up?

The state statute of 1875 permits, instead of a specific denial as to each of the allegations, a general denial; but it does not, and I wish this distinction understood as the rule of the court, it does not permit, under a general denial, affirmative matters of defence to be set up. But if a party has an affirmative matter of defence to be set up, as to a breach of warranty or other matters of that kind, which may occur under a policy, he must set them up affirmatively and separately. Let me illustrate: This is an ordinary form of a declaration on a fire policy; the policy is set out; the plain-

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tiff avers loss, notice, proof of loss, etc. That is all he is required to do. The answer says: "And the said defendants, for further answer to the matters and things in the said plaintiff's petition stated and set forth, say that they admit that they are a body corporate under the laws of the United Kingdom of Great Britain and Ireland; they admit that they are prosecuting the business of fire insurance in the said state of Missouri; they admit that they made and delivered to the firm of Mack & Co. the several policies of insurance filed as exhibits 'A' and 'B' in said case, to insure the said firm" for the period of one year from 1878, terminating in 1879; "they admit that some goods of the description in the said several policies mentioned were damaged and consumed by fire on the fourth day of April, in the year A. D. 1879; they admit that the plaintiffs gave defendants due and proper notice of said fire; they admit that on the twelfth day of May, in the year last aforesaid, plaintiffs delivered to defendants certain papers called preliminary proofs of their alleged loss and damage, in the proofs stated and set forth, as they have in said petition stated and set forth; that they had in said building, at the time said fire occurred, goods of the description in said policy mentioned, the property of the plaintiffs, of the value of \$78,219.32; but defendants deny that the goods so damaged and consumed by said fire were of the value stated by the plaintiffs; and, on the contrary thereof, the defendants say that the whole value of said goods so consumed and damaged by said fire did not exceed the sum of \$48,000, of which the defendants then and there gave notice to plaintiffs,"—that is a defence *pro tanto*,—"and defendants offered to fix said loss and damage with the plaintiffs at the sum of \$48,000, but the plaintiffs refused to fix said loss and damage at said last mentioned sum, and persisted in claiming that at the time said fire occurred said goods were of the value of \$78,219.32; and the defendants say that as to all other matters and things in said petition stated and set forth the defendants deny the same, and each and every allegation thereof, in manner and form, as the same are in said petition stated and set forth." I presume that last clause was out of abun-

dant caution. Every allegation is specifically admitted here on which the plaintiffs' right to recover exists; and the issue is on the affirmative matter of defence.

"For a further and second defence to the matters and things in said petition stated and set forth, defendants say that said policies were made and delivered to plaintiffs upon condition that plaintiffs would faithfully observe, perform and keep certain conditions and stipulations in said policy stated and set forth."

[Here followed a large number of conditions common to fire policies.]

They are conditions precedent and subsequent, put into one general allegation. Now I hold that, under the practice of the state courts, no such pleading is admissible. It would be a very sad thing if it were. If a party has any defence on which he relies, the statute requires that he shall set it up as a matter of defence separately—each by itself. They go to defeat the right of recovery. Defendant admits that what the plaintiffs have stated is correct, but yet sets forth that there are other matters, despite what they have stated, which go to defeat their right of recovery. And each of those must be *specifically* set up—not in gross. If the defendant will look at his pleading he will find that he has cut out of the policy not only matters going to defeat the right of recovery—such as provisions as to warranty, etc., subsequent to the beginning of the policy—but also conditions precedent which are put in issue by his denial. Yet go a little deeper. "Defendants aver that, as to all of said stipulations and conditions, except the giving to defendants notice of said fire, plaintiffs have neglected and refused to perform and observe the same, and that all of said conditions and stipulations, except the giving of said notice of said fire to said defendants, remain unperformed, unobserved, and wholly disregarded by the plaintiffs." What? The plaintiffs are entitled to recover on the face of their pleadings unless something else has happened which is an affirmative matter of defence. Now, in the defendant's pleading all those matters of affirmative defence are

mixed with the precedent matter under one count, and say "he has not done or performed *all*." That is bad pleading.

Here is a specific matter of defence: "For a third and further defence to the matters and things in said petition stated and set forth, the defendants say that after the happening of the said alleged loss and damage to said goods, to-wit, on the twelfth day of May, in the year A. D. 1879, the plaintiffs appeared in the city of St. Louis, before James P. Dawson, a notary public, duly commissioned and authorized to administer oaths in said city, and then and there plaintiffs, in writing, made preliminary proof of their said alleged loss and damage, and in said writings, among other things set forth, the plaintiffs stated that, at the time said alleged loss and damage happened as aforesaid, the plaintiffs had, in said building in said policies described, a large quantity of goods of the description mentioned, of the value of \$78,219.32, and that the same were consumed and damaged by said fire; and then and there plaintiffs signed their names to said preliminary proofs, and made oath before the said James P. Dawson that the matters and things in the said preliminary proofs stated and set forth were true, and then and there the plaintiffs delivered the said preliminary proofs of their said loss to the defendants, and demanded of the defendants payment of the sum of \$8,000, *pro rata*, as for a total loss of the said sum of \$78,000; whereas, in truth and in fact, the whole value of said goods at the time of the said loss and damage, happening as aforesaid, did not exceed the sum of \$48,000, as the plaintiffs then well knew. And the defendants aver that the plaintiffs made the said false statements in said preliminary proofs of said loss, and delivered the same to the defendants, with the fraudulent intent to induce defendants to believe that, at the time the alleged loss and damage happened as aforesaid, the said goods so damaged and consumed by said fire were of the value of \$78,000; and with the fraudulent intent to conceal from the defendants the actual value of the goods so damaged and consumed by said fire; and with the fraudulent intent to induce defendants to believe that they were bound to pay to the plaintiffs the sum of \$8,000;

all of which defendants aver was an attempt by the plaintiffs to defraud the defendants in the premises, and is contrary to the terms of said policies."

That comes, evidently, if true, under one of these provisions of the policy which the party has selected, to-wit: "Any fraud or attempted fraud by false swearing, etc., shall cause the forfeiture of the policy and be a complete bar." That is set up under that provision, I suppose.

The fourth defence is that the fire was caused by the plaintiffs themselves.

The only question raised by the demurrer is whether, in an action of this character, these conditions, precedent and subsequent, may be pleaded in gross.

The statute, as I interpret it, is this: You may put in a general denial as to each allegation on which the plaintiffs' right of recovery depends, instead of putting, as heretofore, a specific denial of each *seriatim*; but when you come to affirmative matters you must then specify each matter of defence according to the rules of pleading pertaining thereto. The demurrer is sustained.

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#### HATHAWAY and others v. ST. PAUL FIRE & MARINE INS. CO.

(Circuit Court, E. D. Missouri. ———, 1880.)

MARINE INSURANCE—GOVERNMENT VESSEL—UNLICENSED PILOT—SEAWORTHINESS.—The mere fact that the officers navigating a government vessel are not licensed pilots, does not *prima facie* render a vessel unseaworthy under the warranties of marine insurance.

J. Chandler and J. P. Ellis, for plaintiffs.

Lee, Marshal & Barclay, for defendant.

Motion of defendant for new trial.

TREAT, J., (*orally*.) Concerning this case we have had very full conference, and I am now authorized by Brother Krekel to announce that we have reached the same conclusion—that the motion for a new trial must be sustained. The character of the action was this: Certain army officers, being ordered from one post to another, proceeded, under an order from the war

department, and shipped their private effects on a government vessel, going up the river. They took out insurance on those effects, the agent of the underwriter knowing that the property was to be shipped on this government vessel. Hence the contention seems to have been, at an early stage of the trial, whether the rules and laws that require vessels to have licensed pilots are applicable to government vessels.

Testimony was received as to the unlicensed pilots navigating the vessel on which the disaster occurred, in order to ascertain whether the vessel was seaworthy, under the warranties of marine insurance. Judge Krekel *originally* held that the mere fact of the officers being unlicensed did not *prima facie* render the vessel unseaworthy, but it was a matter of fact to be determined by the jury. But in the course of the trial and after various arguments the doctrine of contributory loss, and general and particular average, was urged to show that inasmuch as the government or a government vessel could not be compelled to contribute if there had been a jettison, for illustration, therefore the whole case was taken out of the body of the law of insurance as to seaworthiness. But this was not a case involving any such propositions. Yet his instructions were based on that theory. This contract was not between the government and the shipper, nor between the government and the underwriter, but between the shipper and the underwriter; and all the warranties that follow with regard to seaworthiness obtain. Whether the vessel was a government or any other vessel, yet the mere fact that the government vessel does not have a licensed pilot, and is not bound to have one, does not raise presumptions one way or another; it becomes a simple matter of fact, and must be left to the jury. I want to remark that under the motion for a new trial one of the grounds was newly discovered evidence, and that this new trial is not granted on that matter. If that had been all, the motion would have been overruled; but it simply rests upon the point already stated. I am instructed to say, by Judge Krekel, that for these reasons the motion must be sustained.

## DOWNTON v. YAEGER MILLING CO.

(Circuit Court, E. D. Missouri. — 1880.)

**PATENT—MILLING PROCESS—USE OF ROLLS.**—A patent for the manufacture of middlings flour by passing the middlings, after their discharge from a purifier, through or between rolls, is void for want of novelty and uncertainty, when such rolls are inadequate to produce the result described.

*W. G. Rainey and George Harding*, for plaintiff.

*G. M. Stewart and F. W. Cotzhausen*, for defendant.

TREAT, J., (*orally*.) I am prepared to announce my conclusion in the case of *Downton v. The Yaeger Milling Company*. This case was presented at great length last spring, and it was announced to counsel at that time that if the court was compelled, as matters then stood, to decide the case, it would have to decide it in a certain way, but it would be more satisfactory if on certain points it could be more fully presented. That has been done, and very ably. One of the points as to which the court was troubled was whether, under the existing state of the art, this being a process patent, there was any novelty in it. Second, was the patent itself sufficiently specific in its terms to make it practicable, or, in other words, patentable in the form pursued.

It is not proposed this morning to go through the milling literature with regard to these matters, as the various stages of all the matters involved were fully considered at the time of the hearing of the milling cases before Judges Dillon, Nelson and myself. We were then very fully instructed as to this new process, and also as to the state of the art when the new process arose, and the conclusions announced in that case are very familiar to the counsel in this case, and to the milling public generally, by this time.

Now the mills using this new process interject rolls at various stages in connection with grinding, and, after purifying, regrinding the purified middlings. Counsel were asked whether they construed this particular patent as covering *any* use of rolls on purified middlings at any stage of the successive grindings, or whether, under their construction of the

patent, it was a use of rolls, one or more, at a stage intermediate the first and second grindings. Counsel were understood to say that the interjection of such rolls at any one of these successive stages was within the terms of the patent. The importance of that, if the testimony is understood, relates to the question of infringement.

There was a controversy at an early stage of this case, growing out of the transactions between Downton, Allis & Co., of Milwaukee, and this defendant, Yaeger. Judge Dillon and myself disagreed in opinion with regard to the effect of the paper transactions involved, but his ruling with regard to the matter was necessarily the ruling in the case. He held that if there was an infringement of this patent then the defendant must answer, except as to the two chilled iron rolls interposed between the first and second grindings according to the terms of the patent, because Allis & Co., who were to some extent assignees in this matter, made those rolls according to Downton's description, Downton himself superintending the whole matter and putting them in the mill; the contention being on the part of Downton that he informed these parties who had bought these rolls, which came under a subsequent patent, that whilst he put them in they must give him a royalty under his process patent, and hence any use of the rolls by those parties did not exonerate them from a royalty therefor. Judge Dillon and I concurred as to those two; said they were supposed to have been put there for some purpose. They were put there by the plaintiff, and under his very patent, and if it is said that they were put there merely to clog the machinery and for nothing involving a purpose, such a proposition cannot be maintained.

Now the court is brought, for the purposes of this case, to the construction of this patent. It has been read and reread very carefully. If there is anything in it that is patentable, and involves novelty, it is not the use of rolls at every stage of this process—for all the Minnesota mills had been using it before, and in Europe and Missouri the same thing had been practiced for a long series of years—but it was the interjection of rolls between the first and second grindings, whereby



certain effects would be produced; that is, such use flattens the germ or embryonic part of the berry, and also the pellicle, by a crushing instead of a grinding process. It is very obvious to any one who has looked into this subject that if this grinding process is continued, whereby all the matter of the berry, including the germ—which seems to be the most obnoxious part of the whole—is mixed, then, instead of getting a first quality of flour, you have flour that is somewhat inferior in its character; for this waxy germ, in itself, has no especial nutritive property, but damages the flour through various causes. Hence, if you can take that out in the first instance, so that it shall not be ground into the body of the flour, it is certainly a most beneficial effect. To do it you must crush, not grind, for this little embryonic particle is so very minute that, unless you flatten it, it may, under trituration or grinding, pass into the middlings, and if you grind the middlings it will go into the body of the flour. So that the true construction, and the only construction, that will uphold this patent is the interjection of those rolls between the first and second grindings of the purified middlings. By that means the fluffy matter would be thrown off, leaving the tailings to be operated upon thereafter.

Then comes the next question: If that be the true reading of the patent, did this defendant use anything but the two chilled iron rolls at that stage of the process? The evidence is very uncertain on that point. Some say that under the Wegman patent porcelain rolls were used at various stages. But no matter as to that. This question is one to which the court asked particular attention, namely: here is a statement that by the use of rolls in a particular stage of this process certain beneficial results can be had; that is, a flattening of the germ so that it will not pass through the bolts. Now is that to be construed in this way; that any device that might at any time thereafter be had, whereby such a result may occur, is covered by this patent? It seems that anterior to this patent Mowbray and others had been using rolls, and in that very stage of the process, but the contention was that the particular rolls that they were using did not effect the

end to the desired extent, and hence, subsequent to this process patent, it became necessary to have some rolls invented which would effect the end.

Now, it is an elemental proposition as to patents that they shall be so clear that by ordinary means they can be worked out by a person skilled in the art. It is clear that this patent could not be operated by any method until some person invented rolls, which, while they should not be corrugated, because that would be as bad as the mill-stones in triturating, but should be smooth, and yet have sufficient grip and be of sufficient hardness; and that was not all, they must have the same diameters and work with equal speed, instead of differential speed. Neither of which was suggested in the patent.

To summarize, the claim of the patent is specific: "The herein described process of manufacturing middlings flour by passing the middlings, after their discharge from a purifier, through or between rolls, and subsequently bolting and grinding the same for the purposes set forth." Those purposes, as the specification states, are mainly for flattening the germ. That object was effected by the interposition of rolls at that particular stage of the process. Rolls at other stages of the milling process had been previously used, and even rolls by Mowbray at that particular stage; hence, if the patent is to be construed by its terms as covering the use of rolls at any stage of the milling process, it had been long anticipated prior thereto. If it is to be restricted to the use of rolls at the particular stage mentioned, then, so far as this case is concerned, the plaintiff is estopped, because he himself, as heretofore decided, placed the only rolls used at that stage in the defendant's mill.

On the other hand, irrespective of the question of estoppel, if the patent is for a process to be effected without any known means of accomplishing the result, but requiring inventive faculty, whereby rolls to accomplish the purposes, and their modes of operation, were to be determined by new inventions or discoveries, then the patent does not furnish to any one, as then skilled in the art, means whereby the bene-

ficial end could be accomplished. No one in the then existing state of the art could, by the use of any rolls known, or by any modes of operating the same, have effected the designed end. Consequently, to uphold this patent for a process which would have been ineffective without some inventions thereafter had, would be to block the path to all future progress in the art of milling.

The necessary result is that I dismiss the bill, the patent being void for want of novelty, and uncertainty.

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LIGGETT & MYERS TOBACCO Co. v. MILLER and others.

(Circuit Court, E. D. Missouri. March term, 1880.)

PATENT—INTERFERING PATENTS—SERVICE OF NOTICE OUTSIDE OF DISTRICT.—In proceedings for relief against the owners of an interfering patent, under section 4918 of the Revised Statutes, no provision is made for the service of notice upon parties outside of the district in which such proceedings have been instituted.

*S. S. Boyd*, for complainant.

*Hatch & Stem and Winchester & Beattie*, for defendants.

MCCRARY, J., (*orally*.) This is a proceeding under section 4918 of the Revised Statutes of the United States, touching interfering patents. I will read the section in full:

"Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void, in whole or in part, or inoperative or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit, and those deriving title under them subsequent to the rendition of such judgment."

When this case was brought to our attention, on the second day of February last, we held that the proceeding contemplated by this section was an ordinary proceeding in chancery; that it was not a summary proceeding, but an adversary proceeding, in which the party must file the usual bill in chancery and issue the subpoena required by the chancery practice. In accordance with that ruling counsel amended his bill so as to make it conform to the chancery practice, and issued the usual subpoena, which has been served on the defendants who were within the district. He furthermore issued a notice which has been served on parties outside of the district. The notice is as follows, addressed to the several defendants:

"Please take notice that we have this day filed an amended bill in equity in the above entitled cause, under section 4918, Rev. St. of the United States, praying, among other things, that said court may adjudge and declare Re-issue Letters Patent, No. 8030, granted the above named defendants, January 29, A. D. 1878, for 'Improvement in Finishing Tobacco Plugs,' to be utterly null and void.

"Respectfully, etc.,

"LIGGETT & MYERS TOBACCO CO.

"By SAM'L S. BOYD, Solicitor."

The question presented now is, and it is presented really for the second time, whether in such a case as this the complainant may depart from the usual chancery practice, and issue a notice of this character to be served outside of the district.

Counsel has very properly, I think, brought the matter again before us, for the reason that it was considered very hurriedly on the former occasion, and for the further reason that he ought to have the question presented in a shape to be reviewed by the supreme court. But, on a re-consideration of the whole subject, we have reached the same conclusion announced before. No law of the United States makes provision for the service of any process outside of the district. On the contrary, it is expressly provided, by section 739 of the Revised Statutes, that, "except in the cases provided in the next three sections, no person shall be arrested in one

district, for trial in another, in any civil action before a circuit or district court; and except in the said cases, and the cases provided by the preceding section, no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant, or in which he is found at the time of serving the writ."

This is not a case that comes within any exception to that rule. The exceptions are cases where the subject-matter is within the jurisdiction of the court. Now I don't think that section 4918 is intended to change the practice so far as to permit this court, by the issuing of a notice of this character or any other process, to bring before it citizens from any and every part of the United States, to have their rights adjudicated here. On the contrary, I think the section clearly contemplates that the ordinary course of equity proceedings shall be pursued, and that in many cases it will occur that only part of the persons interested will be brought before the court; for it provides, as you will observe, for a judgment which "may declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented;" and further provides that "no such judgment or adjudication shall affect the right of any person, except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

Now, the consequence of giving the statute the construction contended by counsel for the complainant would, it seems to us, be very serious. This is a case of interference. The owner of a patent, residing in Maine, may, according to the construction contended for, file his bill, and by issuing notice upon his own motion, and having it served, bring before the court in that state parties residing in California.

The parties interested in patents are often very numerous; they may be found in every state of the Union, and may be, by such a proceeding as this, brought to any particular place where a complainant may see fit to file his bill, if the construction claimed is sustained. We adhere to our former

ruling; but as the question is important I am glad that counsel has presented it again, so that it may be reviewed, in case the supreme court is called to pass upon the matter.

The motion is sustained.

TREAT, J., concurred.

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LEVI v. COLUMBIA LIFE INS. CO.

(Circuit Court, E. D. Missouri. ———, 1880.)

**JURISDICTION—EXECUTION—JUDGMENT IN FEDERAL COURT—PROPERTY IN CUSTODY OF STATE COURT.**—Where, under the "Insurance Act" of the state of Missouri, proceedings have been instituted in the state court against an insurance company, which finally result in the dissolution and administration of the affairs of that company, all intermediate proceedings must be finally disposed of in that tribunal, even though a valid and subsisting judgment was obtained in the federal court against the company pending such administration.

Motion for execution and order on receiver of an insurance company, dissolved under proceedings in a state court, for the payment of a judgment obtained against such insurance company pending said proceedings in the state court.

*Given Campbell*, for plaintiff.

*Pope & McGinness*, for defendant.

TREAT, J., (*orally*.) M. D. Lewis, public administrator, has filed his petition to have the judgment in favor of Levi revived; and notice thereof having been served on the receiver of the defendant, (dissolved,) the latter appeared, and, not objecting thereto, it was adjudged that said judgment be revived in the name of said administrator, Lewis. Thereupon a rule was entered upon said receiver to show cause why he should not pay the amount of said judgment, or why execution should not issue against the realty or assets of said dissolved corporation. To that rule said receiver has made an answer to the following effect, viz: That said corporation was a Missouri corporation; that on February 22, 1877, the superintendent of the insurance department filed in the proper state court a petition for the dissolution, etc., of said corporation;

that on February 23, 1877, a preliminary injunction was issued; that on August 7, 1877, Alexander was appointed temporary receiver, and that on October 17, 1877, said corporation was dissolved by a decree entered in said proceedings.

The other averments in the return pertain to what has been done under said decree towards winding up the affairs of said corporation, among which it is stated that plaintiff's attorney presented the demand in question for allowance by the referee as a preferred claim, etc.

The suit in this court, which ripened into a judgment, was brought after proceedings had been commenced in the state court to wind up the corporation named, and although judgment was rendered on plaintiff's demand, before the decree of dissolution was had, yet the decree operated to put *in custodia legis* of the state tribunals all the assets of the corporation, as existing on the day of petition, filed. Hence, the judgment of the plaintiff, though valid and subsisting, must be treated like any other demand duly proved, subject to be allowed as such, on presentation to the referee in the state court. This court cannot interfere with the jurisdiction and proceedings of the state court and its officers, who are duly administering the assets of said dissolved corporation.

It may be very difficult to reconcile the several decisions of the United States supreme court concerning such questions, especially in the light of the two cases of *Payne v. Hook*; yet the current of its rulings, and the general principle to be applied, is clear, viz.: that whatever court first obtains jurisdiction of the *res*, or assets of a defendant, must proceed therewith uninterrupted by any other tribunal. Were this not so unseemly conflicts and constant discord would result.

The question raised here is not a new one. Twenty odd years ago the circuit and district courts of the United States had to meet the question, and they determined with general uniformity that where the *res* or property was in the custody or possession of the state tribunals they could not be interfered with. Hence, some twenty-five years ago, cases went up from Michigan and Pennsylvania, in which that question was presented to the supreme court of the United States.

After argument a reargument was ordered, which ripened into judgment in the case of *Taylor v. Carryl*, 20 How. 583. The result was this ruling: That, considering the peculiar character of our government, whatever rightful jurisdiction first obtained custody of these matters, it must, without interruption by other courts, be permitted to proceed.

For instance, in a case of admiralty, when under the various state laws, by attachment or otherwise, the *res* was in the custody of the state authorities, and a warrant is issued in admiralty, where there is exclusive jurisdiction as to some matters, (a stronger case than Mr. Campbell's,) what shall be done with that process? Shall a United States court undertake to take the *res* out of the custody of the state officers? No. So said this court and the supreme court, after reargument. And the state court accordingly proceeded with the matter. If, subsequent thereto, the rights of the parties having been duly considered, a libellant comes, having a prior lien, and pursues the property in the hands of the purchaser, his lien will be recognized and enforced. So stands the body of the admiralty law up to this hour.

Now, *vice versa*, suppose there was a receiver of this court in the custody and administration of certain affairs, and the state courts attempted to interfere with such administration, this court would repel any such interference, and any person who, despite the lawful custody of the officers of this court, should attempt to interfere with such administration, would be in contempt. But, waiving that whether they would or would not, this court would insist upon its officers administering the estate in due form. On the other hand, if the state court is lawfully in possession of these matters it must go on in its course without interference. They are independent jurisdictions for the respective purposes.

With these ancillary matters stated, you may present your demand for and pursue the remedies in one or the other tribunals as you please. Further, take the case in hand. There is an act to be examined—the insurance act of this state. I have examined a copy of the insurance laws with reference to the force and effect of the act. In a few words it is this:



Under the particular laws of the state, under certain circumstances, the state courts should pass preliminarily on certain matters, which might ultimately ripen into a decree for settlement of all the affairs relating to a certain matter or company. Now, if federal courts or state courts elsewhere may proceed by their judgments to strike through such a settlement, which is intended for the equal distribution of all the assets of the company, the settlement may be ultimately destroyed.

Such a state of facts would defeat the very purposes of the statute. It would result in a race of diligence, whereby, through a particular jurisdiction—it may be the state or federal courts, from one end of the Union to the other—priorities may be obtained, and the intention that the assets in the hands of the receiver for the purpose of equal distribution, among all of the demands against the company, be entirely defeated. Consequently, when proceedings are instituted under the insurance act of the state, with regard to a Missouri corporation, the whole matter passes into the jurisdiction and cognizance of the state court, and whatever occurs subsequently thereto, with regard to such administration, must pursue such course as the court having custody thereof may determine as right and proper. If an error is committed the ordinary course must be pursued.

Hence, without going further back than the case of *Taylor v. Carryl*, down to the present hour, with the exceptions of the two cases of *Payne v. Hook*, 7 Wall. 425; 14 Wall. 252, there has been an unbroken current of authority that a federal court shall not interfere with the administration of affairs lawfully in the custody and jurisdiction of a state court. *Vice versa*, no state court can interfere with the custody and administration of the *res* which a federal court has lawfully in custody. Neither the one nor the other shall interfere with the respective officers, to-wit: this court will not tolerate interference with a receiver appointed by it; and, on the other hand, will not interfere with a receiver appointed by a state court. Thus harmony is wrought in the administration.

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tion of affairs. If there should be a question arising after the administration on the one hand of the state or federal tribunals, through its receiver, not coupled with or growing out of the administration of the law through the respective courts pertaining to the conduct of its officers, such subsequent question might be considered; but not pending the litigation.

Hence it should be understood that the naked and broad proposition is decided by this court in this particular case, that where, under the state insurance act, proceedings have been instituted against a company which finally ripen into the administration of the affairs of that company, all intermediate proceedings must be finally disposed of in that tribunal, even though a judgment were rendered here pending the administration. In this case judgment was rendered. It stands as a valid and subsisting judgment, subject, however, in its order of distribution, to the rules pertaining to the administration of these affairs under the insurance act of the state.

Suppose, under the insurance law, the case against this company had been finally dismissed in the state court, this plaintiff would then have had his lien according to its order of priority. But he took his judgment subject to the determination of the state court, whether it should render a final decree of dissolution relating back to the date of the proceedings. Consequently the proceedings here are not void; it is a valid judgment, to await its order in that court like any other judgment. If this is understood, that is all of this case. In other words, having entered of record the revival of this matter in the name of Lewis, administrator, the petition is dismissed as to all other matters, and the party remitted to his proceedings in the state court, so far as this case is concerned.

Now, a few words should be said with regard to the two cases of *Payne v. Hook*, *supra*. In the second case the supreme court of the United States, without expressly saying that it had overruled itself with regard to the matters involved in those cases, practically did so. Mr. Campbell called the atten-

tion of the court to that matter. The case was a peculiar one. This court was reversed, but the reason for the reversal, if it becomes this court to make any comments, are not satisfactory. Suffice it, however, that there was a reversal of the judgment. This court pursued the mandate of the supreme court in letter and spirit, and then the case went up a second time and that court shifted its ground. Hence, whether the case of *Payne v. Hook* is authority for anything is a question.

The principle involved was simply this: One of many distributees of an estate, before final settlement or determination of the affairs of the estate in the proper tribunal, to wit, a probate court, filed a bill in this court against the administrator and his sureties, among other things, to charge him with the amount that would come to her, as distributee, on a final settlement and determination of the questions which were properly to be determined by the probate court. This court held that it could not be done. The supreme court said it could be done, because this particular distributee was a resident of a state other than the state of Missouri. Now if that could be done in the case of a distributee, why could it not be done in the case of a creditor, and what would become of the probate administrations throughout the Union? If there happened to be a non-resident creditor or distributee who chose to proceed in a federal tribunal, then there would be brought into the federal courts the administration of every such estate from one end of the Union to the other, and the probate laws would become of no force.

The supreme court said: "Under the federal constitution laws have been passed that where there are citizens of different states the matter may be adjudicated in the federal courts, whether probate administration is involved or not. It is the duty of the courts, accordingly, to pass upon the matter, and render judgment." Another question was presented, namely: There was a defect of parties; only a part of the distributees, not all, was before the court; hence, in the opinion of this court, the ground was taken as to the defect of the parties in favor of the demurrer. The supreme

court took a different view. Suppose, as was held by this court, that one distributee, and there may be a large number, comes in and takes out of the administration of the probate court the settlement of all of the affairs pertaining to a particular estate, and it is determined by a proceeding in this court that he is entitled to a given sum of money, as remaining after payment of all the lawful demands against the estate, a *pro rata* of which belongs to the particular party. The next day another distributee comes in, and so on, *ad infinitum*. He is not a party to the original proceeding; he is an entirely different party, *res inter alios acta*. The supreme court said, in the first case of *Payne v. Hook*: Very well; judgment having been rendered for an accounting in one case, the other distributees may come in by a supplemental proceeding and become parties thereto, whereby, on final determination and settlement, the gross amount subject to distribution may be determined and then divided. This court pursued that course under the mandate of the supreme court. The other distributees came in in a supplemental way. Objections were interposed, and the matter again went to the supreme court, and they then said that was entirely wrong; it could not be done.

It may be considered that the two cases of *Payne v. Hook* decide nothing. They are not in accord with each other, nor with the uniform rulings of the supreme court of the United States theretofore. Hence the broad principle remains—under the constitution and laws of the country, and of the rulings of the supreme court of the United States in connection therewith—that whatever tribunal, state or federal, lawfully has possession of the *res* of an estate it shall proceed to the full administration thereof, without interference by another tribunal. The state courts are not bound to accept any orders of the federal courts in regard to their mode of determining matters rightfully before them; just as this court would repel any interference by the state courts with the *res* or an estate in its custody. It must suffice, therefore, that the motion for execution and an order on the receiver of the state court must be denied.

The plaintiff can take such action on his judgment, for the allowance of the same by the state court, as he may be advised.

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UNITED STATES *v.* BIEBUSCH.

(*Circuit Court, E. D. Missouri. ———.*)

**PRACTICE—RULINGS OF DISTRICT JUDGE WHEN HOLDING THE CIRCUIT COURT—WHEN REVIEWABLE BY CIRCUIT JUDGE.**—It is well settled in the eighth circuit that the rulings of the district judge, while holding the circuit court, are not subject to review in the same court, by the circuit judge or justice, and the circuit judge will only sit to hear motions for new trials in cases tried in his absence, when the district judge so desires and requests it.

**INDICTMENT—WITHDRAWAL OF COUNT—EVIDENCE.**—The withdrawal of a count in an indictment does not render the evidence offered incompetent, so far as it is legally applicable to the counts of the indictment not withdrawn.

**SAME—FRAUDULENT SALE—FRAUDULENT POSSESSION—EVIDENCE.**—Evidence of a fraudulent sale is competent to support a charge of fraudulent possession under a count in an indictment.

**WITNESS—INFAMY—PROOF OF CONVICTION.**—Conviction of an infamous crime must be shown by the record, and does not affect the competency of the testimony of a witness.

**JUDGMENT—ATTESTATION OF RECORD—REV. ST. § 905—CERTIFICATE.**—The record of a judgment in the state of Illinois is not admissible in evidence in the circuit court of Missouri unless attested in accordance with section 109 of the Rev. St. and duly certified.

**WITNESS—INFAMY—CONFIRMATION OF TESTIMONY.**—Evidence is admissible in confirmation of the testimony of a person who has been convicted of an infamous crime, in such and so many parts of his narrative as may satisfy the jury that he has told the truth, but should not, perhaps, be extended to such acts in the narrative as are generally well known.

Motion for a new trial before the circuit judge, in an indictment tried by the district judge while holding the circuit court in the absence of the circuit judge.

Indictment. Motion for new trial.

MCCRARY, J. In this case and one other I have at this time heard, with the district judge, motions for new trials in cases tried before him when holding alone the circuit court. I have done so at his request, and only for the purpose of

advising with and assisting him. It is well settled in this circuit that the rulings of the district judge while holding the circuit court are not subject to be reviewed in the same court, either by the circuit judge or the circuit justice. I make this announcement so that it may be understood that I am not to be expected, as a rule, to entertain motions for new trials in cases tried in my absence by the district judge, and that I will only sit with the district judge in hearing such matters when he desires and requests it. It is not enough that he does not object or consents. *Appleton v. Smith*, 1 Dillon, 202. In this case, however, I have, at the request of the district judge, considered carefully the questions raised by counsel for defendant in support of their motion for a new trial, and am prepared to announce my concurrence in his rulings.

The questions involved are, I think, sufficiently important to justify me in stating the legal propositions upon which we agreed, and which are conclusive of the motion. They are as follows:

1. Evidence offered in support of an indictment, containing several counts, goes to the jury in support of each and all the counts to which it is relevant, and so far as competent; and where one of several counts is withdrawn after evidence has been offered, it is proper for the court to direct the jury to consider such evidence, under counts not withdrawn, in so far as it is legally applicable to them.

2. In an indictment, charging in one count possession of counterfeit coin, with intent to defraud, etc., and in another count charging a fraudulent sale of such coin, evidence of fraudulent possession and sale may be retained as supporting the first named count after the second has been withdrawn from the jury, though the person to whom such sale is made is not named in the indictment. A fraudulent sale to any person, whether named in the indictment or not, is competent evidence to support the charge of fraudulent possession.

3. At common law a person convicted of an infamous crime was rendered incompetent as a witness, but in England and in most of the states of the Union the disqualification of infamy has been removed, and a conviction may be shown

only to affect credibility. Whart. on Ev. § 397. The tendency of courts and legislatures is now strongly in the direction of the doctrine that all persons of sufficient intelligence should be accepted as competent to testify, leaving to the jury, and not to the court, the question of credibility. In the courts of the United States, as well as in those of many of the states, a defendant in a criminal case may now testify in his own behalf. If, however, a conviction of an infamous crime is to be held to exclude a witness, it is clear that such conviction must be shown by the record. "The record," says Mr. Greenleaf, "is required as sole evidence of his guilt, no other proof being admitted of the crime, not only because of the great injustice of trying the guilt of a third person in a case in which he is not a party, but, also, lest in the multiplication of the issues to be tried the principal case should be lost sight of and the administration of justice should be frustrated." 1 Greenl. Ev. § 372. "It is the judgment, and that only, which is received as the legal and conclusive evidence of the party's guilt, for the purpose of rendering him incompetent to testify. \* \* \* If the guilt of the party should be shown by oral evidence, and even by his own admission (though in neither of these modes can it be proved if the evidence be objected to) or by his plea of 'guilty,' which has not been followed by a judgment, the proof does not go to the competency of the witness, however it may affect his credibility." Id. § 375.

4. The record of a judgment in the state of Illinois by a court of that state, to be admitted in evidence here, must be attested in the manner provided by section 905 of the Revised Statutes, and the certificate must show that the person signing it as judge was, at the time of so signing, the judge, chief justice, or presiding magistrate of the court in which the judgment is of record.

5. Upon the question raised upon this motion as to what evidence may be received in corroboration of the testimony of a witness who is shown to be infamous, the authorities are not perfectly agreed. I am, however, prepared to accept, as applicable here, the rule laid down by Chief Baron Joy in

his work on the evidence of accomplices, pp. 98, 99, and which is as follows: "The confirmation ought to be in such and so many parts of the accomplice's narrative as may reasonably satisfy the jury that he is telling truth without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observations of the judge. See 1 Greenleaf Ev. § 381, note 1. This is, I think, a safe and sound rule, with, perhaps, a single modification. The corroborating evidence should not be extended to such acts in the witness' narrative as are generally known, but should be confined to those matters which, whether in themselves material to conviction or not, are seen to be well calculated to strengthen and confirm the truth of his story.

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*In re WELGE.*

(District Court, E. D. Missouri. ——— 1880.)

**BANKRUPTCY—ASSIGNEE—ALLOWANCE FOR SERVICES AS ATTORNEY.**—The court in its discretion can allow an assignee in bankruptcy additional compensation for his services as an attorney at law in the conduct of necessary litigation for the preservation of the bankrupt estate.

Motion to set aside extra allowance to an assignee in bankruptcy for services rendered as an attorney at law.

*David Goldsmith*, assignee, *in propria persona*.

*S. N. Holliday*, for creditors.

**TREAT, J.** The motion in this case raises the legal question whether under any circumstances an assignee in bankruptcy can be allowed, by way of additional compensation, any sum whatever for his services as attorney in the conduct of necessary litigation for the preservation of a bankrupt estate. The doctrine of trusts forbids the trustee to speculate for his own benefit, but leaves to the chancellor to determine what the measure of his compensation should be.

An assignee, with the consent of court, can have an attor-



ney appointed, to whom proper fees are allowable. Why, then, if the assignee is a competent attorney, should he not act, and thus save the estate the expense of double charges? If some one other than himself were called into the case the needed information would have to be imparted, and even then an inadequate view of what is requisite might be presented.

Experience has shown that when laymen have been assignees they, from lack of legal information, have often turned over, practically, the administration of the respective estates to some attorney, and then claimed the statutory compensation for their services as assignees, and fees for their attorneys. This court has resolutely refused to allow such double compensation, for the assignee is compelled to perform all duties pertaining to his trust for the compensation allowed, and not to employ an attorney except in special cases. If extraordinary services are required and performed, an extra allowance is permitted; and why, if those extraordinary services are such as need a skilled attorney, should he not, if he performs those services, be allowed compensation therefor?

In this case it is not disputed that the assignee, being a competent attorney, and having no assets for expenses of litigation, did institute and successfully pursue needed litigation, whereby the sole assets were secured. If he did the professional work why should he not be allowed therefor, at least, the amount he would have had to pay some other attorney, whom he would have been compelled to instruct as to details?

There is no danger of abuse in such matters, because the allowance is to be made by the court, just as in trusts generally, where the chancellor passes on the true measure of compensation. Here the work was well and successfully done, and the compensation reasonable. Indeed, but for the hazard the assignee took no assets would have existed.

The motion to set aside the allowance is overruled, and the extra allowance granted, subject to the approval of the circuit judge.

THE MONONGAHELA NAVIGATION CO. v. THE STEAM TUG  
"BOB CONNELL" and others.

(Circuit Court, W. D. Pennsylvania. March 5, 1880.)

ADMIRALTY JURISDICTION—LOCKAGE.—A claim for lockage in a public navigable river is cognizable by a court of admiralty.

LIEN—SERVICE IN HOME PORT.—A lien for lockage will not arise where the services were rendered to the vessel in her home port.

In admiralty.

*James I. Kay*, for libellant.

*P. C. Knox, J. & J. H. Barton and J. H. Miller*, for respondents.

MCKENNAN, J. In view of the growing tendency of the decisions of the supreme court towards the expansion of admiralty jurisdiction in this country, I think a claim for lockage in a public navigable river may properly be regarded as a subject of a maritime nature, and so cognizable by a court of admiralty. It has not been authoritatively so classified, but the reasons for such classification apply as decisively to it as to other recognized subjects of admiralty cognizance. Lockage is a service which is purely maritime, and which respects rights and duties appertaining to commerce and navigation; and, as necessary to the use of artificial appliances by which navigation is facilitated, it is not only beneficial to commerce, but is indispensable to enable vessels engaged in it to proceed on their voyage.

I have no doubt, therefore, from the nature of the appellant's claim, that it is within the general jurisdiction of the district court as a court of admiralty.

How may it be enforced, by a libel *in rem* or *in personam*? If the former, it can only be on the basis of a lien against the vessel to which credit was given. A lien arises:

1. By virtue of the general maritime law, in view of the nature of the claim or service, and the circumstances surrounding it.

2. By virtue of a local statute expressly creating it.

As to the latter of these classes it is only necessary to say

that a contract for lockage is not specially secured by any statute in Pennsylvania, and hence that the claim here has no statutory lien.

Nor has it any stronger foothold in the general maritime law. From *The General Smith*, in 4 Wheaton, 438-443, down through a long series of cases to *The Lottawana*, in 21 Wallace, 558, the supreme court has adhered to the rule that a lien is not incident to materials, or supplies, or maritime service, furnished to a vessel in her home port, which is defined to be any place within the limits of the state to which the vessel belongs. Repeated efforts have been made to shake these decisions, as resting upon an irrational distinction between domestic and foreign vessels, but the court has firmly adhered to them. In *The Lottawana*, 578, an impressive effort was made in this direction, but the court met it by saying: "And according to the maritime law, as accepted and received in this country, we feel bound to declare that no such lien exists as is claimed by the appellees in this case. The adjudications in this court before referred to, which it is unnecessary to review, are conclusive on this subject; and we see no sufficient ground for disturbing them." So, also, in *Ex parte Easton*, 95 U. S. 69-75, it is affirmed that a lien for wharfage furnished to a domestic vessel does not exist. The court said: "These remarks \* \* \* are abundantly sufficient to demonstrate that the contract for wharfage is a maritime contract, for which, if the vessel or water craft is a foreign one, or belongs to a port of a state other than that where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf."

It cannot be doubted that lockage is of the same general nature and in the same category with the claims involved in these cases, and hence that like conditions are essential in all of them to the existence of a lien upon the vessel on whose credit they are supplied.

The vessel in this case was owned at Pittsburgh, and that was her home port. The claim in question is for lockage service in passing the vessel through locks in the Monongahela river, within the state of Pennsylvania, erected and

owned by the Monongahela Navigation Company. It is thus a service rendered to the vessel at her home port, compensation for which is not enforceable by a libel *in rem*.

As the fund for distribution arising from the sale of the vessel was insufficient to cover the liens upon it, the appellant's claim was rightfully excluded from any participation in it, and its intervening libel must, therefore, be dismissed, with costs, and it is so ordered.

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**RUPPEL & MCKINLEY v. PATTERSON and others.**

(Circuit Court, W. D. Pennsylvania. March 5, 1880.)

**LEASEHOLD—ASSIGNOR AND ASSIGNEE—RES ADJUDICATA.**—Questions determined by a court of competent jurisdiction in a suit against the assignor of a lease, for rent accruing subsequent to the assignment, cannot be reconsidered in a suit by the assignor against the assignee for the repayment of such rent.

**SAME—STATUTE OF LIMITATIONS.**—In such a case the statute of limitations begins to run in favor of the assignee from the time the assignor paid the accrued rent, and not from the time the assignee made default in the payment of the same.

Motion for a new trial.

The plaintiffs leased a tract of coal land from one Stewart, in 1857, and assigned their leasehold to the defendants in 1858. In 1860 Stewart sold the leased land to the defendants, releasing them from the payment of certain back rent then due, but reserving the right to collect rent due on the lease previous to the date of the sale. In 1873 Stewart brought suit on the lease against the plaintiffs for rent due in 1859, and recovered the same after a protracted litigation. The plaintiffs thereupon brought this suit to recover the money paid by them to Stewart, for rent accrued subsequent to their assignment of the leasehold to the defendants.

*Kenneth McIntosh*, for plaintiffs.

*S. W. Cunningham* and *B. D. Kurtz*, for defendants.

**PER CURIAM.** The relation of principal and surety imports an obligation on the part of the principal to indemnify the

surety as against every liability growing out of that relation, and so to reimburse him whatever sum he may pay necessarily by reason of his vicarious engagement. Especially is this obligation imperative where payment has been made involuntarily by the surety under the coercion of a legal proceeding, which he exhaustively, though unsuccessfully, contested. It is no answer to his demand for reimbursement to say that questions which he fairly presented in the creditor's suit, and were decided against him by a court of competent jurisdiction, were decided erroneously, and ought to be reconsidered and rejudged, because the only duty which the law imposes upon him, as between him and the principal debtor, is to oppose to the creditor's action every proper defence known to him, or to cast the burden of defence entirely upon the principal by giving him notice to that effect. In either case the result is decisive as to the principal and surety alike, in a subsequent controversy between them.

This is the purport of the instruction to the jury, and we are unconvinced that there was any error in it.

As it is practically decisive of the defendants' liability it is immaterial to consider whether the alleged release by Stewart to the defendants discharged the debt claimed here, and so released the plaintiff, as surety, or was only a covenant not to sue the defendants, with a revocation of the creditor's right of action against the plaintiff. It is not an open question.

The remaining reason for a new trial is the alleged error of the court in instructing the jury that the statute of limitations began to run against the plaintiff from the time when he paid the debt for which he was liable as surety, and not from the time when the defendants made default in the payment of it to their creditor.

It is obvious that, until the plaintiff paid the debt, he had no *legal* demand against the defendants, nor could he maintain an action at law to recover it. Now the statute of limitations operates imperatively upon *legal* remedies only, precluding a resort to them after six years from the date when the right to maintain them accrued. Until the plaintiff was in a position to maintain an action against the defendants the

statute did not begin to run against him. This is too clear to need amplification.

It is argued, however, that upon the defendants' omission to pay the debt at its maturity the plaintiff might *then* have required them to exonerate him from his liability, and that hence from that time the statute of limitations began to run. *Ardesco Oil Co. v. North American Oil & Mining Co.* 16 P. F. Smith, 66 Pa. St. 375, is referred to to sustain this argument. It is there held to be "well settled that as soon as the surety's obligation becomes absolute he is entitled in equity to require the principal debtor to exonerate him," 381, and that this right is enforceable by an action, in which the measure of damages is the amount of the debt for which the surety is liable. It is distinctly recognized as strictly an equity, which may be thus enforced only because, under the peculiar system which exists in Pennsylvania, equity is administered through common law forms. But this exceptional mode of administration does not change the character of the right. It is still an equitable incident to the relation of principal and surety, which entitles the latter to demand protection against the former's possible default, and is, in its nature, distinct from and independent of the surety's *legal* remedy where the burden of payment has been actually cast upon him. Out of the payment of the debt the surety's right to employ such remedy springs, and hence it is clear that the statute of limitations has no relation to it until it accrues.

The motion for a new trial is, therefore, denied, and judgment is directed to be entered on the verdict.

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WOVEN WIRE MATTRESS COMPANY v. WIRE WEB BED COMPANY.

(Circuit Court, D. Connecticut. March 18, 1880.)

Injunction for violation of patent.

SHIPMAN, J. This is an application for a temporary injunction to restrain an alleged violation of reissued letters patent.

dated May 29, 1877, for an improvement in bedstead frames. The original patent was issued November 30, 1869, to J. M. Farnham, assignor to the plaintiff.

The validity of the patent has recently been sustained by Judge Blodgett, holding the circuit court for the northern district of Illinois, in three contested cases, which were apparently tried together.

The claims of the patent are as follows:

1. The combination of the side bars and end bars, and elastic coiled wire, fabric "D," attached only to the end bars, with the end bars of the frame elevated above the side bars, so that the fabric will be suspended above the side bars from end to end of the frame.

2. The combination in a removable bed bottom or bedstead frame, of the side-bars "A," standards or corner pieces "B," end bars "C," and the elastic fabric "D," combined and arranged substantially as and for the purposes specified.

3. The inclined double end bars "C" of a bedstead frame, arranged substantially as and for the purposes herein shown and described.

4. The standards "B," constructed as described, arranged longitudinally, adjustable on the side bars of a bedstead frame, to permit the inclined end bars to be set a suitable distance apart, as set forth.

Judge Blodgett, in construing the first two claims by the light of the evidence as to the state of the art, says that while these claims "may be sustained for the combination of the side rails, standards, end rails, and elastic coiled wire fabric, yet it must be limited to the peculiar kind of side rails, standards and end rails shown, or their manifest equivalents. Side rails, end rails, and elastic coiled wire fabric were old; but the inclined end rail, made in two parts for the purpose of clamping the fabric and holding it suspended by means of the inclination between the points of attachment, seems, so far as the proof of these cases shows, to have been the invention of Farnham. So, too, his 'standards,' or corner pieces, 'B,' are not shown to have been anticipated by any prior user or inventor."

The first two claims of the patent are found only in the reissue. The third and fourth claims were in the original patent. Judge Blodgett is evidently of opinion that the end bars of the first claim must be the "inclined double end bars" of the third claim, and that the standard of the second claim must be adjustable on the side bars, so as to permit the enclosed end bars to be set a suitable distance apart, substantially as stated in the fourth claim. The point in dispute between the parties in this case, upon the question of infringement, is in regard to the inclination of the end rails. It is admitted that the frame which is produced is a fair sample of the articles made by the defendants. The end rails are certainly inclined, not nearly to such an extent as in the plaintiff's bed frames, but they are plainly inclined, so that the strain of the bed bottom comes upon the double end of the end bar, and the under side of the fabric does not rest substantially upon the end bars. How this inclination is effected was not made clear. I do not think that it results from the strain of the fabric upon an uninclined bar. The bar must be inclined when the frame and the fabric are put together.

Upon the question of novelty the old bed frame which came from Baltimore did not impress me as originally and designedly having inclined end bars. If the end bars are now inclined I think such inclination is the result of wear and tear.

An injunction should issue against violation of the first and third clauses of claim.



WASHBURN & MOEN MANUFACTURING COMPANY v. COLWELL  
STEEL BARB FENCE COMPANY and others.

WASHBURN & MOEN MANUFACTURING COMPANY and another v.  
COLWELL STEEL BARB FENCE COMPANY and others.

SAME v. SAME.

(Circuit Court, D. Connecticut. March 18, 1880.

Motion to vacate or modify decrees obtained in the above suits by the Iowa Barb Steel Wire Company, upon the ground that said decrees are being used in other courts in applications for injunctions against it or its agents.

SHIPMAN, J. At the September term, 1878, of this court, three final decrees for the plaintiffs were obtained—one in the suit of the Washburn & Moen Manufacturing Company against the Colwell Steel Barb Fence Company and others, and two in two suits of the same plaintiff and Isaac L. Ellwood against the same defendants. These three decrees were obtained by consent of the parties, no argument having been had thereon, and by unusual inadvertence this fact was not incorporated in the decrees. The patents which were involved in the suits were reissued letters patent, Nos. 6976, 6918, 6914, 7136, 6902, 7036, (division "B,") and 7566.

The Iowa Barb Steel Wire Company, not a party to these suits, now moves that it be permitted to intervene in said causes; and, alleging in substance that it is incidentally affected by the decision of the questions involved in said decrees, and that said decrees are being used, to a certain extent, in applications for injunctions against itself, or its agents, in other circuit courts, prays that this court will vacate said decrees, or will modify them so far as to express the true circumstances and facts under which they were obtained.

Service of said motion was made upon the solicitor for the plaintiffs in this court. The plaintiffs' counsel have not appeared, for the alleged reason that, in their opinion, the court

would not entertain favorably a summary motion of a stranger to said suits to vacate or modify said decrees upon the grounds stated in said motion. Said counsel also sent their motion papers in the now pending Massachusetts case.

I find, upon examination of the affidavit of Charles L. Washburn, that the court is informed that the decrees in all the cases therein mentioned, including the Connecticut cases, were submitted to, or were consented to, and that the end of the litigation was by agreement. Entertaining serious doubts of the power to grant the motion for the cause alleged, at the instance of a stranger to the suits, the motion is denied.

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HALL v. THE PENNSYLVANIA RAILROAD COMPANY.

(Circuit Court, W. D. Pennsylvania. January 23, 1880.)

COMMON CARRIER—BILL OF LADING—LIMITATION OF LIABILITY—GOODS BURNED BY A MOB.—An exception in a bill of lading exempting a common carrier from liability for "loss or damage on any article or property whatever, by fire or other casualty, while in transit, or while in depots or places of transshipment," is applicable to goods forcibly taken from the carrier, while in transit, and burned by a lawless mob, where such carrier was not guilty of any negligence by which the efficiency of the exception was in any way impaired.

Action against a common carrier for damages.

*John Fallon*, for plaintiff.

*Wayne McVeagh* and *Chapman Biddle*, for defendant.

MCKENNAN, J. This suit was brought to recover from the defendant the value of certain wool, delivered to it at Chicago for transportation to Philadelphia. A jury having been waived, the case was tried by the court upon the evidence submitted by the parties. The following facts are found as established by the evidence:

1. The value of the goods in controversy was, on the twenty-second day of July, 1877, at the point of shipment, \$18,060.38, and at the point of destination, \$20,972.97.

2. "The said goods had, in course of transit from their place of shipment to their respective destinations, reached

the city of Pittsburgh at least 24 hours before the fire occurred in said city, on July 21 and 22, 1877, and were then in defendant's custody in the cars in which they had been shipped, and the said cars and the said goods were burned in said fire."

3. "The defendant, about July 19, 1877, found itself unable to maintain, against the force of a mob, entire possession and control of its own property, and the property in its custody, including that of the plaintiff, and to operate its road. It then called upon the proper authorities, including the sheriff of Allegheny county, for assistance and protection; a requisition was made by said sheriff upon the governor for the assistance of the military power of the commonwealth. In pursuance of such requisition, troops were ordered by the governor to aid said sheriff in retaking and redelivering to the defendant entire possession and control of such property, and to enable it to operate its roads; and in endeavoring so to do said troops, on July 21, 1877, came into conflict with said mob and failed to dispossess the same, and immediately after said conflict and failure the property in question was destroyed by fire communicated by said mob."

4. The goods in question were "received by the defendant on bills of lading of the form of the annexed receipt, being one of what is usually known as the 'Red Star Union Line fast freight' receipts, with all and singular the conditions therein contained." This bill of lading is numbered No. 2,856, and is thus identified and exhibited as part of the finding in this case.

The foregoing facts are found in pursuance of the written admission of the parties filed in the case.

It is further found:

5. If the transit of the goods in question had not been interrupted at Pittsburgh, and had been continued in regular course, the train containing them would have been at a considerable distance from Pittsburgh eastward before the time of the occurrence of the fire.

6. When the train containing said goods reached the depot of the defendant in Pittsburgh, on July 19th, the hands who

had conducted it there left it, and a "strike" of all the regular train hands of the defendant occurred on that day, in consequence of a refusal by the defendant to accede to their demand for an increase of wages.

7. On the nineteenth of July there were standing on the track in the depot yard at Pittsburgh a number of cars laden with petroleum, about 150 yards distant from the cars which contained the plaintiff's goods. They were in the same relative position on the day when the fire occurred. The oil cars were kept in place by ordinary brakes. The grade of the road was descending towards the freight cars, so that the oil cars would run towards the former by their own gravity. At or before the occurrence of the fire the oil cars were caused to move down the grade until they came in contact with the freight cars, and they were all burned up together.

8. On the nineteenth, twentieth and twenty-first of July, freight trains continued to be brought into the depot yard of the defendant, at Pittsburgh, both from the east and west, in the regular course of transit, and were there stopped, so that there was an unusual accumulation of trains at that point.

The court is respectfully requested by plaintiff to find, as matters of law:

1. That defendant's duty as common carriers was to carry plaintiff's goods from the several points of shipment to \* \* Philadelphia, the point of delivery of all, without any unusual or avoidable delay, and, apart from the special conditions in the bill of lading, defendant is liable for loss from any cause save the acts of God or a public enemy.

2. That defendant did not cease to be common carriers by reason of the conditions in the bill of lading, but continued subject to all liabilities of common carriers, except for losses happening for causes enumerated in said conditions, without default or negligence on the part of defendant's servants or employes, while defendant was actually discharging its duties of carrying the goods from the point of shipment in the usual and proper manner.

3. That the interruption of the transit by reason of the refusal of the servants of the defendant, in charge of the

freight trains on which plaintiff's goods were being carried, to perform their duty was a default on part of defendant.

3½. That the strike and refusal to perform duty on the part of the men does not justify or excuse the interruption of the transit of plaintiff's goods; and that defendant's election not to pay the 10 per cent. additional wages demanded, and in lieu thereof to allow the goods to remain at Pittsburgh, wholly or partly in the control of persons who prevented defendant from "operating its road" and performing its contract as common carriers, makes defendant liable for all the consequences, including the destruction and loss of said goods, during the period that the transit was thus interrupted, and the plaintiff's property thus wrongfully controlled, without proof of any other negligence or misconduct on the part of defendant.

4. That allowing or suffering others than its own employees to take from defendant the possession or control, whether in whole or in part, of plaintiff's goods, and to use that control, not for the purpose of furthering or continuing the transit, but for the purpose of suspending and preventing it, was a default on part of defendant.

5. That however proper it may have been for defendant to call on the public authorities for protection and assistance "in retaking and redelivering to defendant the entire possession and control of said property," such act of propriety in no way justifies the previous default in suffering the possession and control thereof to pass out of its hands.

6. That the various risks enumerated in said conditions, which are assumed by plaintiff in relief of defendant's general liability, and more especially the risk "of fire while in transit," are limited to losses occurring while the defendant is engaged in carrying the goods, in the proper discharge of its duties under the contract, and do not include loss by fire occurring while the transit is suspended, and the goods in question have been suffered by defendant to pass into the possession and control of persons acting adversely to the duties defendant assumed to discharge.

7. That it was gross default and negligence on the part of defendant to allow freight trains to come into Pittsburgh on

the nineteenth, twentieth and twenty-first of July, under the circumstances in the seventh clause of the facts, which the court is requested by plaintiff to find, mentioned.

8. That it was gross default and negligence to allow cars loaded with petroleum to continue to stand on the track, under all the circumstances and manner, and for the period of time in the eighth clause of said facts mentioned.

9. That defendant is responsible for the misconduct and default of the persons whom it suffered to take control and possession, wholly or jointly with itself, of plaintiff's property, and to continue in such control for the space of two or three days, during the period of time while that control and possession continued, and for all loss resulting from such misconduct.

10. On the facts and law aforesaid, plaintiff prays the court to enter judgment for \$20,973.97, and interest from July 22, 1877, to the day judgment is rendered.

Answers by the court to the foregoing propositions of law presented by the plaintiff's counsel:

1. This proposition is affirmed.

2. This is also affirmed.

3. As it was the duty of the defendant, as a common carrier, to transport the goods of the plaintiff to their point of destination without unreasonable delay, any injurious interruption of such transportation, by the refusal of the defendant's servants to perform their duty, would be a breach of duty imputable to it; and for any loss to the plaintiff, caused by such delay, the defendant would be liable in damages.

3½. I decline to affirm this proposition. The evidence does not show that the loss complained of was caused by the "strike," nor that any permissive allowance of the retention of the goods at Pittsburgh can be imputed to the defendant. On the contrary, it is admitted by the plaintiff that the defendant was coerced by the superior power of a lawless mob, which usurped control of the train containing the plaintiff's goods, and prevented the defendant from operating its road; that the defendant took prompt steps to meet the emergency by an appeal to the civil authorities for protection and assist-

ance; that these authorities, with the military force summoned by them, were repelled; and that the train, with these goods, was thereupon destroyed by an incendiary fire.

While these circumstances would not protect the defendant against a failure to fulfil its obligations as a common carrier, yet I cannot say that an involuntary technical default warrants an imputation of negligence to the defendant touching a cause of loss which is expressly excepted from its liability.

4. The defendant was deprived of the control of the train containing the plaintiff's goods, and was prevented from continuing their transit, by a force it was unable to resist. It cannot be held responsible for the *purpose* of the mob, although the act of the mob in intercepting the transportation of the goods might subject the defendant to compensation to the plaintiff for any loss sustained by him by reason of such interrupted transit of his goods. I decline, therefore, to affirm this proposition.

5. This proposition is affirmed, with the qualification that I do not say that the defendant was in fault, otherwise than as and for the reason stated in the answer to proposition 3½.

6. I decline to affirm this proposition. The exception in the bill of lading is that the carrier shall not be liable "for loss or damage on any article or property whatever, by fire or other casualty, while in transit, or while in depots or places of transshipment." The engagement of the carrier is to assume the custody of the property entrusted to him at the point of shipment and to deliver it at the place of destination, and the obvious intent, as well, I think, as the clear import, of the exception, is to protect him against the consequences of fire during the continuance of his duty as a carrier. His qualified liability is co-extensive with this duty, and he forfeits its protection only by some fault of his own in connection with the casualty to which the exception refers. Nor can I regard it as within the reason of the exception to hold that it is eliminated from the contract when the property in the carrier's charge is wrested from him by a hostile force, which he is unable to resist, and it is consumed in an incendiary fire,

although his exclusion from the possession and control of it may last for two days before it is thus destroyed.

7. I decline to affirm this proposition.

8. I decline to affirm this proposition for the reasons that the petroleum cars were presumably in the usual and proper place for them in the depot yard; that they were at a safe distance from the cars containing the plaintiff's goods, and were there secured by mechanical appliances usually employed for that purpose, that they might lawfully be kept there, and that their removal into contact with the other cars was the act of the incendiary mob which had, for two days before, maintained a forcible mastery of the situation.

9. I decline to affirm this proposition.

Upon the whole case I am of the opinion, and so find, that the loss complained of was caused by fire, while the plaintiff's goods were in transit by the defendant, within the meaning of the exception in the bill of lading; that the defendant is not shown to have been guilty of any negligence by which the efficiency of the exception is in anywise impaired; and hence that the plaintiff is not entitled to recover. Judgment will therefore be entered in favor of the defendant.

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WERTHEIMER and another *v.* THE PENNSYLVANIA RAILROAD  
COMPANY.

(Circuit Court, S. D. New York. January 23, 1880.)

BILL OF LADING—COMMON CARRIER—SHIPPER.—The acceptance of a bill of lading binds the shipper and precludes him from alleging ignorance of its terms.

SAME—NEGLIGENCE—BURDEN OF PROOF.—Where loss arose through one of the excepted causes contained in the bill of lading, the *onus probandi* rests upon the shipper to show that such loss occurred through the negligence of the carrier.

*Adolph L. Sanger*, for plaintiffs.

*Robinson & Scribner*, for defendant.

WALLACE, J. On or about July 17, 1877, the defendant received from plaintiffs, at the city of New York, for transpor-



tation to Pittsburgh, Pennsylvania, goods of the value of \$1,710. At the time of receiving the goods the defendant delivered to plaintiffs a bill of lading, whereby it agreed to transport the goods, subject to several conditions, among which was one that the company should not be responsible for loss or damage by fire, unless it could be shown that such damage or loss occurred through the negligence or default of the agents of the company.

On the seventeenth of July the car containing the goods was dispatched by defendant from Jersey City for Pittsburgh, reaching Pittsburgh about 1 o'clock A. M., July 20th, at which time a mob took possession of the defendant's property, including the car in question, and held possession until July 22d, when troops ordered by the governor of the state to aid the sheriff in retaking the property came in conflict with the mob, failed to dispossess the mob, and the mob fired the property and thereby destroyed it.

The delivery of the bill of lading by the defendant, and its acceptance by the plaintiffs, at the time of the delivery of the goods, must be deemed to constitute a contract between the parties, with the conditions contained in the bill of lading. *York Company v. Cent. Railroad*, 3 Wall. 107; *Bank of Ky. v. Adams Exp. Co.* 93 U. S. 174; *Grace v. Adams*, 100 Mass. 505; *McMillan v. Mich. Southern & N. I. R. Co.* 16 Mich. 79; *Hopkins v. Westcott*, 6 Blatch. 64; *Kirkland v. Dinsmore*, 62 N. Y. 171. These cases all hold that the shipper who accepts the bill of lading cannot be heard to allege ignorance of its terms. It is unnecessary to refer to the cases where, from the peculiar circumstances attending the acceptance of the receipt, assent to its terms was held not to be implied, as the present case is the ordinary one, where no peculiar circumstances are shown. Neither are the cases in point which accede that assent on the part of the shipper will not be implied to any conditions which do not appear on the face of the bill of lading. Such was the case in *Ayres v. The Western R. Corp.* 14 Blatch. 9, which was decided upon the authority of *Railroad Co. v. Manufacturing Co.* 16 Wall. 318.

The effect of the contract made between the parties was to impose upon the plaintiffs the burden of proving that the loss of the goods by fire arose from the negligence of the defendant or its agents. In *Clark v. Barnwell*, 12 How. 272, Mr. Justice Nelson says: "Although the injury may have been occasioned by one of the excepted causes in the bill of lading, yet still the owners of the vessel are responsible if the injury might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods. But the *onus probandi* then becomes shifted on the shipper to show the negligence." [See syllabus.] In *Transportation Co. v. Downer*, 11 Wall. 129, the judgment of the court below was reversed because the jury were instructed that it was incumbent upon the defendant, the carrier, to bring itself within the exception by showing that it had not been guilty of negligence. Other authorities to the same point need not be cited, as the cases referred to are conclusive upon this court.

The plaintiffs have not shown negligence upon the part of the defendant, and therefore cannot recover. But, irrespective of any considerations concerning the burden of proof, when it appeared, as it did here, that the fire by which the plaintiffs' goods were destroyed was the act of a mob, engaged in a struggle with the military authorities of the state, without anything to show that the defendant was bound, from the circumstances, to anticipate such a result, the defence was affirmatively established.

The motion for a new trial is denied.

## WOOD &amp; Co. v. THE PHOENIX INSURANCE Co.\*

(District Court, E. D. Pennsylvania. March 23, 1880.)

**GOODS CARRIED ON DECK—GENERAL AVERAGE—EXCEPTION—CUSTOM—BURDEN OF PROOF.**—The general rule is that goods carried on deck are not entitled to the benefit of general average. To this rule there are the following exceptions: *First*, where the goods are carried on deck in pursuance of a general custom; *second*, where they are carried on the decks of steam vessels; *third*, where they are carried on deck by contract and the suit is against the vessel only. *The Milwaukee Belle*, 2 Biss. 197, disapproved; *Lawrence v. Minturn*, 17 How. 105, distinguished. Where the exception is claimed on the ground of custom, the burden of proof is on the party alleging the custom, and the evidence should be clear.

**CARGO LOADED ABOVE AND BELOW DECK—EVIDENCE.**—The owner of a cargo loaded both above and below deck insured the portion below deck, the underwriter knowing of the storage of the balance above deck. During a storm the goods above deck were jettisoned. *Held*, that in the absence of clear evidence of a general custom so to carry the goods, the owner had no claim against the underwriter for contribution.

Libel by owner of goods jettisoned against the underwriter of the balance of the cargo to recover contribution by general average. The facts are sufficiently stated in the opinion.

*Henry G. Ward*, for libellant.

*Henry Flanders*, for respondent.

**BUTLER, J.** On the fourth of October, 1879, the libellants shipped on board the "Mary and Eva," then lying at Millville, New Jersey, a cargo of iron pipe, loaded in part above and in part under deck, 31 tons of which were to be delivered in New York and the remainder at West Point. In the course of the voyage the vessel encountered tempestuous weather, and it became necessary to throw a portion of the deck cargo overboard. The respondent had insured what was under deck with knowledge that similar cargo was to be carried above. The libel asserts "that it is the custom of the trade, in shipping cargo of iron pipe, to load a part thereof on deck," and claims that the respondent is liable to contribution by general average. The answer denies the existence of such a custom and of all liability for the loss. It would seem that the deck

\*Reported by Frank P. Prichard, Esq., of the Philadelphia bar.

load was not included in the policy because the libellants were not willing to pay the respondent's terms for such insurance. The propriety of the jettison is not questioned.

The doctrine of general average for property thus lost was a part of the celebrated maritime code of the ancient Rhodians, in which it was thus stated: "If goods are necessarily thrown overboard, for the purpose of lightening the ship, the loss is to be made good by the contribution of all, because it was insured for the benefit of all." No clearer statement has been made since. The doctrine is founded in pure equity. The sacrifice being made for the safety of the vessel and remaining cargo, the owner of the goods should bear no more than his just proportion of the loss thus incurred.

From the benefit of this right to contribution the owner of goods loaded above deck was excluded on the ground that such loading is improper, tending to embarrass the movements of the crew and the working of the ship. To the universal application of the rule (excluding deck cargo) serious objection has been made from the outset, and strenuous effort used to limit its operation. It has been urged that some goods may be placed on deck without embarrassing the crew, or the movements of the vessel, and especially in short voyages from port to port; that custom has established the safety of such loading in some kinds of cargo and in voyages between certain places; and that where such loading is in pursuance of contract with the carrier he cannot urge the objection that it is improper. From the beginning most, if not all, elementary writers on the subject have stated the rule with exceptions. Valin says: "The doctrine excluding goods carried on deck (and jettisoned) from general average ought to be controlled by the usages of trade; and accordingly contribution may be claimed for goods thrown overboard from the decks of small coasting vessels, or river craft, which usually carry part of their cargo on deck." Valin Ord. de la Mar. art. 13.

The only exception which seems well supported, of an early date, is one in favor of goods carried on deck in pursuance of *custom*. What is said in the early cases and elementary works, respecting goods so carried on small coasting vessels,

must be referred to custom, and is true only to the extent that such custom is shown to exist. As the reason for exclusion is the unsafe and improper loading, it might be supposed that the rule would not apply in any case where it could be shown by testimony that, from the character of the cargo or the voyage, the loading is safe and proper. A careful examination of the authorities, however, will show that this question is referred to the judgment of the trade as expressed in its customs, and cannot be inquired of in any other way.

When steam was applied to purposes of navigation it was found that cargoes could be carried on the decks of vessels thus propelled with safety, and the rule has not, therefore, been applied to cargoes so carried. At the present time a further exception is allowed in most maritime countries against the vessel and its owners, where the cargo is carried on deck, by agreement between the owner of the cargo and the vessel.

In England, until the year 1837, no exception whatever was allowed. Goods carried on deck were, under all circumstances, excluded from the benefit of contribution. In that year the cases of *Gould v. Oliver*, 4 Bing. (N. C.) 134-140; *Hireley v. Milward*, 1 Jones & Carey, 240, arose, and were followed in 1842 by *Milward v. Hibbard*, 3 Ad. & El. (N. S.) 121. Since the decisions in these cases the exceptions allowed elsewhere—in favor of goods carried on deck in pursuance of custom, carried on the decks of steam vessels generally, and by contract where the claim is against the vessel—may be regarded as well established there. Elementary writers and judges in numerous instances have used language indicating a belief that the exceptions are more extensive, embracing deck cargo in all coastwise trade, and justifying claims against the owners and insurers under deck where previous knowledge is shown of an agreement to load above. No case, however, has been cited by counsel nor found by the court in which this has been allowed. In *Johnson v. Chapman*, 35 L. J. C. P. 23, (decided in 1865,) which followed the ruling in *Gould v. Oliver* and the other English cases cited, the learned counsel who depended on these cases said, (as appears by the report :) "It was decided in *Gould v. Oliver* that, as between the shipper

on deck and the vessel, where the goods are so carried by agreement, the latter is liable to contribution for jettison, but not the owners or the underwriters of the under deck cargo."

In *Hireley v. Millward*, *Johnson v. Chapman*, and in every other case found in which the claim for contribution was based on an agreement to carry on deck, the suit was against the vessel or its owners alone.

Lownds on General Average, at 41 and succeeding pages, says, (after noticing the change effected by *Gould v. Oliver*, and the other cases cited:) "Where the provision for carrying on deck is inserted in the charter-party the loss for jettison is replaced by contribution between the ship-owner and the owner of the deck load. It is adjusted in the same manner as a general average would be, but it is a general contribution. Payment by general contribution is enforced from no one who has not, by express contract, made himself a party to the stowage on deck. If there are on deck goods belonging to a third party, such party is not held liable to pay any share in the contribution. No insurer is asked to replace what his assured has contributed unless there is a clause in the policy assenting to the deck shipment. The principle of these adjustments is that, as between the assenting parties to such stowage, the deck must be taken to be a proper place for such stowage, which is thence to be treated as if stowed below; but, as regards all parties who have not thus assented, the old rule remains in force, and from them there is no general average."

There is no proper warrant for the suggestion that owners below deck, and underwriters, may be held to an implied assent that goods shall be carried above, from knowledge that the master has contracted so to carry. The author just quoted, when remarking upon the general terms employed by the court in *Johnson v. Chapman*, and other cases, says: "These observations must be understood with reference to the question before the court; that is, to the right of the owner of the deck load to contribution from the owner of the ship."

In our own country the question has escaped the federal courts, except in a single instance, which will be noticed

directly. In the state courts, down to 1837, the English rule, as then applied, was followed, and the exceptions allowed elsewhere disregarded. Since that date these courts have differed, in some of the states adopting the exceptions now recognized in England, and in others disregarding them. Chancellor Kent (3 Kent's Com. 11th Ed. p. 323) and Parsons (in his work on Shipping, p. 333) express the impression that the weight of authority here is against the exceptions. While this impression may have been correct at the time it was expressed, it is not, in my judgment, at this time. *Gillette v. Ellis*, 11 Ind. 578; *Meahrer v. Lufkin*, 21 Texas, 383; *Harris v. Moody*, 4 Bosw. 210; *Insurance Co. v. Spears*, 30 N. Y. 270.

Mr. Phillips, in his work on insurance, section 1282, after noticing the cases decided in this country and abroad, says: "Taking into consideration the whole jurisprudence on the subject the better doctrine, though opposed to some of the adjudications cited, seems to be that a jettison of deck load is to be contributed for in general average *when the stowing of the jettisoned articles on deck is justifiable*, and the other parties interested have notice, by the policy, or by usage, or otherwise, that such articles may be so carried, and there is no plainly established usage denying the right to claim contribution." While this language is not free from ambiguity it will not admit of any other reasonable interpretation than that where the stowage on deck is justifiable and proper (as in cases of general custom or under contract) contribution may be had, unless indeed, there be a usage to the contrary. All the author says is predicated of the stowage being proper.

Mr. Parsons, (2 Par. on Mar. Ins. 221,) after reviewing the cases, says: "The rule should be that, wherever, from the peculiar nature of the goods, or of the voyage, or, in fact, for any reason, a custom exists to carry on deck, and this custom is so well established and known that the insurers must be presumed to have known it, they should not only pay for them if lost, but should pay the owners of the goods [carried under deck] for their contribution for the goods if jettisoned to save the ship and cargo." Where a custom is shown, knowl-

edge of its existence is presumed. As before remarked, the question has escaped the federal courts except in the single instance of *The Milwaukee Belle*, 2 Biss. 197. *Lawrence v. Minturn*, 17 How. 105, turned on a different point. The suit was for non-delivery of merchandise, carried on deck by contract. Being lost by peril of the sea, for loss by jettison is such, without fault of the vessel, it was not responsible for non-delivery. Had the claim been for contribution a different case would have been presented. Some observations are made by the court on the general subject of contribution for jettison, but the citations show that the particular aspect of the subject now under consideration was not in mind. The court was indeed careful to distinguish the claim before it from one for contribution, saying that the libellant's "right to contribution is not involved in the case."

The *Milwaukee Belle* was decided by the district court for the eastern district of Iowa. The claim was against the vessel for contribution. The goods jettisoned from the deck had been placed there under a contract with the owner of the vessel, made at his instance and for his special benefit. The court dismissed the libel, relying on *Lawrence v. Minturn* for doing so. It is submitted, with great respect and deference for the judgment of the court, that the review of this subject already made shows that this decision cannot be followed consistently with the well established doctrine abroad, or the weight of authority at home.

The question in the federal courts must be regarded as still open, and it may well be regretted that this case cannot reach the supreme court, and the danger of conflicting decisions and confusion, respecting a subject of so much importance, be avoided. In my judgment the rule, with its exceptions as established abroad, is wise and just, and I am unable to see any good reason why we should not follow it. The importance of uniformity in commercial and maritime laws and usages throughout the world cannot be disregarded in considering the question.

Does the case in hand fall within either of the exceptions? The only one the libellant can invoke is that which rests on



custom. The vessel was not propelled by steam, nor was the respondent party to a contract to carry on deck. Has a custom so to carry been shown? The voyage, as we have seen, was from Millville, New Jersey, to New York and West Point, and the cargo consisted of iron pipe. The respondent knew that a part was to be carried on deck; but this knowledge, in the absence of a general custom rendering such carriage proper, is unimportant. It imposed no obligation. If any existed it is because the trade had determined, and declared by its custom, that such carriage is safe, and therefore proper. Nor can importance be attached to the respondent's payment for a previous loss. It is not clear that the circumstances were correctly understood, and, if they were, the payment is entitled to no weight in determining the legal responsibility involved here. Was the cargo carried on deck in pursuance of a general custom of the trade? On this point there is the testimony of a single witness, the libellant's former book-keeper. His knowledge on the subject does not seem to extend beyond his employer's business, and his testimony is virtually confined to a statement of their practices. His general expressions of belief are of no value. There is no evidence that it is customary to carry generally on deck between Millville or other adjacent ports and New York and West Point, nor so to carry freight of the particular description here involved. The testimony need not have been confined to the carriage of iron pipe, for it may be that this has not been sufficient to establish a custom. It might have extended to other bulky cargo of similar character. The burden of proof is on the libellants, and to establish a custom so as to take their case out of the general rule of law the evidence should be clear. It is not, and their claim cannot therefore be allowed. *Coxe v. Heisley*, 19 Penn. 243.

In this connection the language of Judge Story in the case of *The Schooner Redside*, 2 Sumner, 584-586, may be read with advantage: "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages in almost all kinds of business and trade to control, vary, or  
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annul the general liability of parties under the common law, as well as under the commercial law." It is proper to say that I do not attach any weight to the fact that the respondent declined to insure the deck cargo. The claim is not founded on the contract of insurance, but on the obligations which the law is supposed to attach to the relations of the parties. Nor do I consider it important that the under and over deck cargo belonged to the same person. The risk of that under was on the respondent, and if that above had been properly there—as in pursuance of general custom so to carry—the sacrifice of it for the respondent's protection would, I believe, render him liable.

Decree dismissing the libel.

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### IN THE MATTER OF PETER HERDIC, Bankrupt.

(*District Court, W. D. Pennsylvania. February 14, 1880.*)

**BANKRUPTCY—OPPOSITION TO DISCHARGE OF BANKRUPT—BURDEN OF PROOF.**—Although suspicious circumstances may in certain cases be sufficient to authorize a court to find the concealment or fraudulent appropriation of money by a bankrupt, yet it is well settled that the burden of sustaining specifications of objection to the discharge of a bankrupt rests upon the opposing creditors.

**SAME—PROPER BOOKS OF ACCOUNT—DISCHARGE.**—The provision of the bankrupt law which withholds a discharge, "if the bankrupt, being a merchant or tradesman, has not at all times, after the second day of March, 1867, kept proper books of account," applies only to merchants and tradesmen in respect to their business as such merchants and tradesmen.

In bankruptcy, on specifications of opposition to the bankrupt's discharge.

*Henry C. Parsons, H. C. McCormick and Mr. Crocker, for opposing creditors.*

*Clinton Lloyd and John M. Kennedy, for the bankrupt.*

**ACHESON, J.** Certain creditors of the bankrupt, Peter Herdic, having filed specifications of opposition to his discharge, they were referred to Frederick E. Smith, Esq., register, with directions to take testimony thereon and make report of the

facts to the court. The register took and returned to the court the testimony offered by the respective parties, and made a report favorable to the bankrupt upon all the specifications.

Upon the coming in of the register's report the case was fully and very ably argued by the counsel of the opposing creditors and of the bankrupt. Since the argument I have attentively read the testimony, and the case has received careful consideration. The circuit judge, McKennan, sat with me at the hearing, and the conclusions I have to announce were reached after consultation with him, and have his approval.

The specifications of opposition are thirteen in number; but the fifth, sixth, seventh, twelfth and thirteenth were not pressed at the argument. In respect to them, therefore, I content myself with saying that the evidence does not sustain them, or any of them.

The first and second specifications relate to the same matter, and may be considered together. They charge, in substance, that the bankrupt "has wilfully sworn falsely" in the affidavit attached to his petition, in this, that in his schedule he returns that he has no real estate in his possession or enjoyment, or which is held by any other person in trust for his use, (except as therein stated,) when in truth and in fact he was interested as the owner of the undivided one-third of certain lands in Potter county, Pennsylvania, then held in trust for him by one Jacob Tome, and which he did not return, but wilfully and fraudulently omitted from his schedule.

The facts relating to these lands are as follows: By deed bearing date October 19, 1872, Jane Phillips conveyed to Jacob Tome, of Port Deposit, Maryland, 12 tracts of land in Potter county, Pennsylvania, containing in the aggregate about 11,385 acres, for the consideration of \$45,240. An article of agreement (not recorded) of the same date with this deed was entered into between Jacob Tome, Peter Herdic and A. G. Olmstead, which recites the purchase by these parties of said lands; that Tome had paid in hand one-third the purchase money, and was to pay the residue, which was secured by his mortgage, in one and two years, with interest; that the title was vested in Tome in trust for himself and

Herdic and Olmstead; that the lands were to be sold at such times and prices as the parties should think advisable, and until sold Herdic and Olmstead should pay Tome interest on two-thirds of the amount of each payment of purchase money made by him at the rate of seven per cent. per annum, and each party should pay one-third of the taxes; that when the lands were sold Tome should be first reimbursed the purchase money paid by him, and the balance of the proceeds of sale should then be equally divided between the three parties.

Jacob Tome paid the entire purchase money. Herdic paid his stipulated share of the interest which accrued up to October 19, 1875, but he paid no interest subsequently accruing.

The parties made no sales of any part of these lands. They were never able to dispose of them at an advance, or, indeed, for the price Tome had paid for them.

Herdic being in arrear for his share of the taxes, his interest in said land was sold for taxes at treasurer's sale, on June 10, 1878, and purchased by Jacob Tome, to whom the treasurer of Potter county executed a deed.

Mr. Tome testifies that he and Olmstead have been and are willing to sell these lands at what they cost, and even for less. From the uncontradicted evidence it is manifest that at the time when the bankrupt made his affidavit these lands were not worth the money Jacob Tome had invested in them. The bankrupt's interest in them was, therefore, of no value whatever had it then been redeemed and unencumbered. But it appears that whatever redeemable interest the bankrupt then had was encumbered by unimpeachable liens, amounting to far more than the value of the entire 12 tracts.

In explanation of the omission from his schedule of his interest in these lands, Mr. Herdic testifies: "It had been sold at treasurer's sale, and I didn't think it belonged to me." Under all the circumstances I accept this explanation as reasonable and truthful. Certainly the evidence does not warrant the harsh conclusion that the bankrupt "has wilfully sworn falsely" touching this matter.

The third and fourth specifications relate to the alleged concealment by the bankrupt of certain personal property. The third specification charges that the bankrupt has concealed and failed to deliver to his assignees \$25,000 which he received from Jacob Tome a few months before the filing of his petition in bankruptcy. The fourth specification charges the like concealment of and failure to deliver to the assignees the sum of \$10,000, which it is charged the bankrupt delivered to his friends to purchase at sheriff's sale, for his use and benefit, his household goods and other property, and that the money was so applied.

It appears that on January 24, 1878, Mr. Herdic received from Jacob Tome the latter's notes for \$25,000, given in the purchase of certain bonds issued by the Minnequa Springs Improvement Company. On or about that date Herdic discounted Tome's notes at Philadelphia. Out of the proceeds Herdic paid \$10,010.69 to the Manufacturers' National Bank of Philadelphia, in discharge of his indebtedness to that bank. This is proved by John W. Moffly, president of the bank. Mr. Herdic testifies to other proper payments, in discharge of his liabilities, made with the moneys realized from the discount of the Tome notes. After these payments there remained in his hands about \$10,400, which he brought to Williamsport. At that time W. F. Reynolds & Co., the plaintiffs in a judgment against Herdic, had an execution for \$10,000 in the hands of the sheriff of Lycoming county. This execution had issued January 22, 1878.

Undoubtedly, the evidence shows that it was originally the intention of Mr. Herdic to apply the \$10,400 he brought from Philadelphia to the Reynolds execution. But he soon found himself hopelessly pressed by other creditors and abandoned his purpose to pay off Reynolds & Co.'s judgment. He testifies that he applied the whole of the \$10,400 to the payment of debts and to the maintenance of his family, and that it was all so used within two months after he got it. To some extent he particularizes his expenditures. It certainly would have been more satisfactory had his testimony on this subject been more explicit. He swears positively, however, that no

part of this money was furnished to friends to be used in purchasing in his property at sheriff's sale, and in this he is not contradicted. It is not pretended that there is any direct evidence that any of the money in question was used for the purchase charged in the fourth specification. But the court is asked to draw such inference. I agree with the learned counsel for the creditors that suspicious circumstances may be so strong as to authorize a court to find the concealment or fraudulent appropriation of money by a bankrupt. But I altogether fail to find such circumstances in this case. It is well settled that the burden of sustaining specifications of objection is upon the opposing creditors. It is always a fair presumption that the bankrupt has acted with integrity.

The eighth specification charges that the bankrupt has wilfully sworn falsely in the affidavit attached to his petition, in that he has wilfully omitted from his schedule certain amounts received by him on August 26, 1878, to-wit: from J. W. Maynard, \$5,000; from Guy W. Maynard & Co., \$3,579.42; and from G. W. Maynard & Co., \$27,572.67. To sustain this specification the opposing creditors rely upon certain entries in the books of the bankrupt made on said date, whereby the accounts of the persons above named are respectively credited with the sums mentioned. But the evidence is plenary that the bankrupt did not receive, at that time, said sums, or any part thereof. This specification therefore falls. The said entries are part of those which are the foundation of the eleventh specification, and were made under the circumstances and for the purpose hereinafter stated.

The ninth specification charges that the bankrupt, having knowledge that Charles E. Gibson had proved a false and fictitious debt against him of \$3,900, did not disclose the same to his assignees within one month after he acquired such knowledge. I am by no means prepared to say that the evidence warrants the conclusion that Gibson's proof of debt is of the character here alleged. But if this ever so clearly appeared, it would be essential to show that the bankrupt had knowledge of the fact in order to sustain this

specification. Of such knowledge on the part of the bankrupt there is no evidence. Gibson's proof, indeed, was sworn to at the office of Mr. Herdic, before Mr. Hinkley, a notary public, who had been, and perhaps then was, in the bankrupt's employ. But it does not appear that Mr. Hinkley had any reason to doubt the correctness of Gibson's claim. Mr. Herdic himself took no part in the preparation of Gibson's proof, did not examine it, and was not consulted with respect to it.

The tenth specification charges that the bankrupt, being a merchant, has not at all times since the second day of March, 1867, kept proper books of account, in that such books do not show what moneys were received and what disposition was made of them. And the eleventh specification charges that he has not kept proper books of account, in that on the twenty-sixth of August, 1878, three days before the filing of his petition in bankruptcy, he caused 15 pages of entries to be made in his day-book of business transactions, amounting to at least one million of dollars, and most of said transactions having occurred several years prior to said entries.

These specifications designate the bankrupt as a "merchant;" and the evidence, I think, does show him to have been a dealer in lumber, as a merchant within the meaning of the bankrupt law. His transactions in lumber seem to have been principally as a partner with other parties, but to some extent he was individually a dealer in lumber. Besides his dealings as a lumber merchant, Mr. Herdic had very large business transactions. He extensively bought and sold real estate, was largely engaged in laying street pavements, and carried on other enterprises of magnitude, which had no connection with his business as a merchant.

The bankrupt law withholds a discharge "if the bankrupt, being a merchant or tradesman, has not at all times, after the second day of March, 1867, kept proper books of account." This requirement applies only to merchants and tradesmen, (Blumenstiel, 521,) and as to them must be understood as requiring the keeping of proper books of account only in respect to the bankrupt's business as a merchant or tradesman.

If he has kept such books he is entitled to his discharge, although he may not have kept proper books of account touching other business transactions. It was strenuously urged at the argument that the bankrupt was not entitled to his discharge because he had kept no cash-book or proper cash account, and authorities were cited to show that the failure by a bankrupt, he being a merchant or tradesman, to keep a cash account, is good ground for refusing his discharge.

The opposing creditors produced in court, and deposited with the clerk, five books of the bankrupt, viz.: One blotter, one day-book, marked "Journal E," one ledger, marked "C," and two bills payable books. But these are a part only of the books kept by the bankrupt. At page 118 of the testimony the register notes an offer of evidence by the creditors of "all the books delivered by Peter Herdic to the assignees," and these are there stated as "Ledgers A, B and C, Journals A, B, C, D and E, book of bills receivable, two books of bills payable, two blotters, and Journal B and Ledger B, labeled 'P. H.'s." But, as I understand the evidence, this formal offer does not embrace all the books of account which the bankrupt kept; for the assignees and Mr. Hinkley testify that still other books of account of the bankrupt, by and with the acquiescence of the assignees, were not delivered into their actual custody, but for safe-keeping were left at Mr. Herdic's office.

Not having before us all the books, it is impossible to decide by inspection whether or not a proper cash account was kept. Resort must therefore be had to the testimony.

The following question and answer appear in the testimony of C. C. Taylor, the book-keeper: *Question.* "Where is the cash-book of Mr. Herdic?" *Answer.* "He didn't keep any." Page 88 of evidence. It will be observed that the witness does not say that Herdic kept no cash account, and from his testimony, as a whole, the inference is a fair one that a proper cash account was kept. Upon this subject Mr. Hinkley, an expert in book-keeping, was examined on behalf of the creditors, and was asked by their counsel the following question: "Where is the cash-book of Mr. Peter Herdic?"



To which he answered: "For his individual use he kept no cash-book. For his lumber accounts cash-books were kept. These books are at the office." Page. 58. This witness further testifies: "As I stated before, he had kept lumber books, and that these lumber books are cash-books." Id. Again, in his examination in chief, he was asked: "Did he keep any individual cash account?" To which he answered: "He did in his individual lumber books." Page. 59. In the cross-examination of this witness the following questions and answers occur: *Question.* "Were there regular books of account, cash-books and others kept, showing his transactions in lumber?" *Answer.* "There were." Page. 62. \* \* \* *Q.* "Were those books properly kept, showing the transactions in lumber, in your judgment as a book-keeper?" *A.* "Yes, sir." This evidence stands uncontradicted.

I now approach what I consider the most doubtful question in the case. On August 26, 1878, three days before the filing of the petition in bankruptcy, by the direction of Mr. Herdic, fifteen pages of entries were made in his books, all under said date, and aggregating considerably more than \$1,000,000. Did these entries concern Mr. Herdic's business as a merchant? This, it seems to me, is the vital question, for if they relate to transactions distinct from his business as a lumber merchant, it is immaterial that they were not duly made in the proper course of book-keeping. I fail to discover in the testimony of the witnesses anything to show to what branch of the bankrupt's business the entries in question relate. But an inspection of the books themselves has satisfied me that a large proportion thereof, both as respects number and amount, have no connection whatever with the lumber business, but relate to other matters. As to the nature of many of the entries I can form no opinion. A few seem to have relation to the bankrupt's business as a merchant, but this I cannot affirm certainly.

The evidence, however, does show that the making of these entries was a transaction entirely free from any taint of fraud. The purpose was to close worthless accounts, and old accounts long previously settled, but never entered on the books. The

entries were made after consultation with Register Smith, and under his advice, with a view to excluding from the schedule worthless accounts. It is not shown that the entries in any wise worked injury to the bankrupt's estate or were prejudicial to creditors.

Upon the whole, therefore, I am brought to the conclusion that neither the tenth nor the eleventh specification has been sustained.

The specifications of opposition having been disposed of upon their merits, it has been deemed unnecessary to consider the exceptions thereto filed by the bankrupt.

I am of opinion that all the specifications should be overruled, and the bankrupt granted his discharge, upon the presentation of the register's certificate of his conformity to the provisions of the law.

And it is so ordered.

McKENNAN, J. I sat at the argument of this case with the district judge, in order that the delay in the final determination of it, which might result from an appeal to the circuit court, might be avoided. The foregoing opinion, therefore, is to be understood as expressing the views of both of us, and as practically deciding the controversy.

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#### FRICK v. THE COUNTY OF CHRISTIAN.

(*Circuit Court, D. Kentucky.* March 4, 1880.)

**AWARD—COUNTY COMMISSIONERS—RATIFICATION.**—An award will not be vacated for want of authority in the county commissioners to make the submission at the instance of a party to the arbitration, when such award has been approved by the county court and the money paid by the county in pursuance of the same.

**SAME—MISTAKES OF FACT.**—A demurrer to a bill to set aside an award will not be sustained, where the award was based upon mistakes of fact which had not been called to the attention of the arbitrator at the time the award was made, and which, if known, would have changed the result of the award.

Demurrer to bill to set aside award. The facts set forth in the bill, and in the amendments thereto, are substantially as follows: On April 20, 1867, the complainant entered into a contract with certain commissioners, appointed by the county court of Christian county, for the erection of a court-house for the sum of \$53,413. Complainant began the construction of the building and pursued it for about a year, when complaints were made with regard to the poor quality of the work, and complainant also made a counter claim for extra work performed outside of the contract. It was finally agreed to submit the whole matter to an arbitrator, and, on the twenty-second of October, 1868, the complainant and the commissioners, acting apparently without authority, agreed that one Shryock, an experienced architect of Louisville, should arbitrate and settle all matters of dispute between them, taking the contract, deciding what deduction should be made for defective and imperfect work and bad materials, and also what Frick should have for the extra work, and determine what should be paid him over and above the contract price.

On November 3d the arbitrator made his award, declaring that the contractors should rebuild certain portions of the court-house, and that complainant was entitled to receive for his extra work the sum of \$23,189.30 over and above the contract price. The bill further alleges that in making this award the arbitrator mistook the amount of extra work done, the materials furnished, and the price that was agreed to be paid to the complainant therefor; and also made a mistake in measuring the extra cut stone-work constructed by him; and afterwards, having discovered these mistakes, attempted to correct the same and make an amended award, which, it is conceded, he had no authority to do, whereby he awarded to the complainant the further sum of \$4,186.28, this award being dated October 3, 1870. The county appears to have paid the complainant the amount originally awarded to him by the arbitrator, and the complainant to have received it, but the county refused to pay the amount allowed in the amended award, or to have anything whatever to do with it further.

Complainant further alleges that at the time the original award was rendered, and for a long time thereafter, he did not know of the mistakes, whereby he claims that the award is invalid, and that after the discovery of such mistakes he did not recognize or treat the award as valid or binding, and immediately gave notice to the arbitrator and to the defendant that he would not be bound by the arbitration.

It seems that on the twenty-second of December, 1869, about six weeks after the original award was made, the county court entered an order to the effect that it was willing to hear the arbitrator and others in reference to the complainant's claim, and pay one-half of the arbitrator's traveling expenses, but nothing was ever done by the county in affirmance of the amended award. In what is termed the amended award the arbitrator states that after his original award was completed complainant brought him a certificate of one McKennan, stating that there was in the front portico cut stone not measured nor accounted for by the arbitrator, and also 6,980 brick in the arches not measured nor accounted for by him, and that upon examining fully into the matter he ascertained that in the measurement formerly made and inserted in his award the arches and soffit of the portico, which should have been measured three times, were measured but once, and the bases and caps of the pilasters of the portico in the second story, and the work of the groined arches, had not been measured at all.

The bill of the work so re-examined amounted to \$2,323.78. It seems also that in the original award he allowed only \$1.50 per foot for the stone-work of the portico, and that after the award was completed he was shown the record in the books of the commissioners of an agreement to pay the complainant at \$1.75 per foot for all extra stone-work done on the building, and he considered it a matter of justice that he should be allowed the additional 25 cents on all the extra cut stone-work, which would amount to \$2,492.50, making the whole of his claim, not included in the original amount, \$4,816.28. The prayer of the bill is that the original award be set aside: (1) for want of authority in the commissioners

to enter into it; and (2) for the mistakes of fact; and that the defendant be decreed to pay to him the sum of \$13,535.06, which he claims is still due.

Defendant demurs for want of equity.

*L. H. Noble*, for complainant.

*Bullitt, Bullitt & Harris*, for defendant.

BROWN, J. I am clearly of the opinion that the award ought not to be vacated for want of authority in the commissioners to make the submission. While it was probably not within the scope of their power as agents of the county in the construction of the court-house, the award was formally approved by the county court on the fifteenth of July, 1869, and the money paid in pursuance of it, and the act of the commissioners in making the submission was thereby ratified. Besides this, it does not lie in the mouth of the complainant to claim that the defendants had no authority to enter into the arbitration, he having become a party to it, and consenting to be bound thereby.

Whether the bill makes out a case for setting aside the award upon the ground that the arbitrator was mistaken in his facts, is not entirely clear. The authorities all agree that for certain mistakes of fact an award may be set aside, as, for instance, if the mistake appears upon the face of the award in a matter of computation, or if it should turn out that the arbitrator had made use of false scales or measurements, or had used an imperfect compass in running the boundaries of land, or had been guilty of any other gross and palpable error which he had committed without fault of the party seeking to set aside the award.

The leading American case upon the subject is that of the *Boston Water-Power Company v. Gray*, 6 Met. 131, 169 and 182. In a very learned and exhaustive opinion, Chief Justice Shaw discusses the whole subject of mistakes of law and fact in the award of arbitrators, and comes to the conclusion that an award may be set aside if the mistake is of such a nature, so affecting the principles upon which the award is based, that if it had been seasonably known and disclosed to the arbitrators, if the truth had been known and understood by

them, they would probably have come to a different result. "The mistake must be of some fact, inadvertently assumed and believed, which can now be shown not to have been as so assumed." This case is followed by *Rundel v. La Fleur*, 6 Allen, 480; *Palmer v. Clark*, 106 Mass. 373; *Carter v. Carter*, 109 Mass. 306; *Spoor v. Tyzzer*, 115 Mass. 40; *Davis v. Henry*, 121 Mass. 150. These cases lay down, as I conceive, the true doctrine, that if the facts relied upon to invalidate the award were before the arbitrator, considered by him, and his judgment was based upon those facts, the award cannot be set aside by showing that he came to a wrong conclusion; but if a fact existed to which his attention was not called, and upon which he was not asked to apply his judgment, or if he was so misled or deceived that he did not apply the rules which he intended to apply to the decision of the case, so that upon his own theory a mistake was made which caused the result to be something different from that which he would have reached by the exercise of his reason and judgment, the award ought to be vacated.

In *Schenck v. Cuttrell*, 1 H. W. Green's Ch. 297, it is said that an award ought not to be set aside unless the arbitrator himself would change it if the alleged mistake were shown to him.

Applying these principles to the case under consideration it appears that in allowing complainant's claim for extra work he fixed the price of the cut stone at \$1.50 per foot; whereas, it is shown to him afterwards that the commissioners had contracted to pay \$1.75 per foot. Here was a mistake which was not called to his attention, and which would have made a difference of \$2,492.50 in his award. It further appears that he overlooked a very considerable amount of extra work in and about the portico, and made a mistake of measurement, which, if the actual facts had been made known to him, would have increased the award by \$2,323.78. Now, if these facts had been called to his attention, and he had considered them and rejected the claim, there would be no ground for setting aside the award. But, as by his own statements they were overlooked, and he appears to be desir-

ous of correcting them, it would seem to be a case, particularly so far as the allowance of \$1.50 instead of \$1.75 a foot is concerned, for vacating the award.

Upon the whole I have come to the conclusion, taking the allegations of the bill together, the complainant has stated a case which may ultimately result in the award being set aside, and that this bill ought not to be dismissed upon demurrer. Possibly, counsel may agree to submit the case upon the testimony tending to invalidate the award, without going into the testimony showing the amount actually due the complainant, if the award be set aside, and thus save expense; but I think it would be unjust to dismiss this bill, and allow the case to go to the supreme court, where the bill might be held sufficient, the case sent back, and the litigation indefinitely prolonged.

The demurrer will therefore be overruled.

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MILLBANK v. THE SCHOONER "A. P. CRANMER" and others.

(*District Court, E. D. New York.* January 24, 1880.)

**COLLISION—STEAM VESSEL AND SAILING VESSEL.—**RULE 20, REV. ST. § 4233.—Rule 20, Rev. St. § 4233, that a steam vessel should keep out of the way of a sailing vessel does not apply to a tow composed of two steam tugs and 17 canal boats.

In admiralty.

BENEDICT, J. On the twenty-fourth day of July, 1877, the schooner A P. Cranmer and the canal boat John A. Heister came in collision in the bay of New York and the canal boat was sunk. At the time of the collision the schooner was sailing down the bay upon the starboard tack, and was between Bedloe's Island and the can-buoy on Robbins Reef. The canal boat was the outside boat on the port side of the head tier of a tow of 17 canal boats then being towed from Amboy to New York by two tugs—the W. C. Nichols and the Sammie. The tugs were towing one ahead of the other, the Nichols being the leading boat, and were pulling the tow at

the speed of about two and a half miles an hour. It was a clear day, a working breeze blowing, and no other vessels moving in the vicinity. The schooner passed the two tugs in safety to the westward. Just about as she passed the Sammie, in order to avoid running into the canal boats, she hove her wheel down; but as she swung, one of the towing hawsers caught under her tuck and threw her off from the wind again, so that she ran head on into the libellant's boat, causing her to sink instantly.

This action is brought against the schooner and both the tugs to recover the loss thus caused to the libellant, and the question to be determined is, whose fault was it that caused the collision? No fault on the part of the canal boat is pretended. No fault on the part of the Sammie has been shown, for she was not the leading boat and was subject to the movements of the tug ahead. The direction of the tow was with the Nichols alone. The only question, therefore, is whether the collision was caused by the fault of the Nichols or the fault of the schooner, or by the faults of both.

If this were the case of a sailing vessel and a steam vessel its disposition would be easy enough, for it would be controlled by the rule which compels a steam vessel to keep out of the way of a sailing vessel. But it is not such a case. Here the collision was between a schooner and a canal boat, the former moving by her sails, the latter being fastened in a tow composed of 17 canal boats and being pulled along by two steamboats. If the sailing vessel and the canal boat are to be deemed the two colliding forces, the rule governing steam vessels is applicable to neither. If, on the other hand, the 17 canal boats and tugs fastened together, as they were, are to be deemed a single vessel, so far as the application of the sailing rules are concerned, then such combined vessel cannot, as I conceive, be deemed to be a "steam vessel under steam," within the meaning of the sailing rules prescribed by the statutes of the United States.

The provision of rule 20, (old art. 15, § 4233, Rev. St.) that a steam vessel shall keep out of the way of a sailing vessel, if intended to apply to any steam vessel having a tow,



cannot be supposed to be intended to apply to a combined mass of seventeen canal boats and two tug boats; for in the case of such a tow, although the motive power is steam, the vessel with steam was by no means free, but hampered by connection with canal boats, so that neither the steamboat nor the mass of boats possessed any considerable part of that power to control their own movements which is characteristic of a steam vessel when steaming alone, and is the foundation of the rule that requires steam vessels to keep out of the way of a sailing vessel. This case cannot, therefore, be disposed of by a reference to sailing rule 20, (old article 15,) but must be decided in accordance with those general principles that lie at the bottom of all sailing rules, and are applied by courts of admiralty to cases as they arise. The test of responsibility in this case is, therefore, to be found in the ability possessed by the respective vessels to control their own movements and avoid collision. And when the position of these vessels is considered with reference to this test, it is apparent the schooner could without any considerable difficulty have placed herself sufficiently far to westward of the tow to avoid all danger of collision. If she had a free wind, as several witnesses say, she had only to haul a little nearer to the wind. If, as she contends, her course was close to the wind, she could have worked to windward sufficiently to avoid the canal boats by luffing into the wind. The way was clear, the wind sufficient, the schooner light; and, so far as appears, there was nothing to prevent the successful accomplishment of such a manœuvre, and this was what the schooner attempted. She failed in the attempt only because she was caught by the hawser extending from the Sammie to the canal boats—a circumstance attributable solely to the fact that she delayed action until too late. Her fault, therefore, consists in omitting to put her helm down until she was too close to the canal boats.

As supporting this view of the duty attaching to the schooner under the circumstances stated, reference is made to the case of *The Arthur Gordon and the Independence*, 1 v.1,no.4—17

Lush. 270, cited with approval in the case of *The Electra*, 7 Ben. 349. But the case of the tow was far different from that of the schooner. On the part of the tow—a mass of boats moving slowly in the tide, and compelled to keep in position—the ability to take effective action to avoid the schooner was small indeed.

It has been strongly contended that it was possible for the Nichols, and accordingly her duty, to move her tow further to the eastward when the near approach of the schooner was observed. But while, in view of the vast amount of property that is moved by tugs in late years, and the care required to preserve the boats from accident, I am not inclined to relieve tow boats from the responsibility of taking all possible means of avoiding collision, I am not satisfied that in this case there was anything possible to be done by the tug, after the danger of collision was presented to their minds, that would have prevented the collision. If anything was possible, it was to swing the tow a little to east; but although there is evidence from a single witness, that affords some foundation for the contention that such a movement could have carried the canal boats far enough to the eastward to have escaped collision with the schooner, I am not satisfied that the attempt would have proved of any avail.

My conclusion, therefore, is, that inasmuch as the tug, which had the direction and control of the tow, could do nothing after the danger was apparent towards moving the canal boats further to the eastward, and inasmuch as the schooner, when she saw herself in danger of running into the canal boats, could without serious inconvenience have moved further to westward and so have avoided the collision, the schooner alone was in fault, and is responsible for the loss in question.

DANIEL DALSTROM and others v. THE OUTFIT OF THE SCHOONER  
"E. M. DAVIDSON."

(*District Court, E. D. Wisconsin. January term, 1880.*)

WAGES—SALVAGE—CONFLICTING CLAIMS.—Under the circumstances of this case it was *held* that the wages earned by seamen after their vessel had been wrecked, but before she was finally abandoned, did not constitute antecedent wages in a sense which would postpone them to the claims of the salvors, and that the proceeds derived from the sale of the outfit of the vessel must first be applied to the payment of the demands of such seamen.

In admiralty.

The facts of this case, as shown by the pleadings, were these: On the fifteenth day of October, 1879, the schooner Davidson left Chicago on a voyage to northern ports on Lake Michigan. Libellants shipped on board as seamen. On the next day the vessel was stranded on Pilot Island Reef. On request for assistance from the master, Wolf & Davidson, of Milwaukee, dispatched the tug Leviathan, with steam-pump and other apparatus, to the relief of the vessel. Efforts were made to get the vessel off, and were continued until November 26th, but they were unsuccessful. From the time the vessel was stranded until exertions to relieve her were abandoned libellants continued on board. On the twenty-fifth day of November, the master of the tug being convinced that the vessel could not be relieved, deemed it advisable to save her outfit, consisting of boats, tackle, rigging, apparel and furniture, and ceased his efforts in behalf of the vessel. Thereupon the master and crew of the tug, with the assistance of the crew of the vessel, removed the vessel's outfit to the tug, and brought it, together with the master and crew of the vessel, to the port of Milwaukee. Libellants were then discharged, but were not paid their wages, and thereupon libelled the outfit. Decree was rendered in their favor, the outfit sold, and the proceeds were paid into the registry of the court. Thereupon the owners of the tug intervened, by petition as salvors, insisting that their claim for salvage service was privileged to that of the seamen, and asked for payment as having the prior right to the

proceeds of sale; and the question was whether, under such a state of facts, the wages of the seamen, or the claim for salvage service, was to be first paid.

*Mr. Markham*, for the seamen, cited *Pitman v. Hooper*, 3 Sumner, 50; *The Massasoit*, 1 Sprague, 97; *The Isabella*, Brown's Adm'y Rep. 96-103; *The Sailor Prince*, 1 Benedict, 234; *The Steamboat Pilot No. 2*, 1 Newberry, 215-217; *Smith v. Stewart*, Crabbe's Rep. 218; *Lewis v. The Elizabeth & Jane*, 1 Ware, 35.

*Mr. Krause*, for salvors, cited *The Salina*, 2 notes of case 18, 16 Monthly Law Reporter, 5; *Reed v. Hussey*, 1 Blatch. & How. 527; *Collins v. Steamboat Fort Wayne*, 1 Bond, 484.

DYER, J., held that the seamen were not discharged from the obligation of their contract of service by the happening of disaster to the vessel; that it was their duty, so long as their personal safety permitted, to remain by the wreck and to save as much as possible; and that upon compliance with this obligation the fragments of the vessel constituted a fund pledged for payment of their wages; that upon abandonment by them of the wreck the contract between them and the owner of the vessel would be dissolved, and that they would then lose their privilege against the vessel and their claim for wages; that as libellants remained by the wreck and did not abandon it until the outfit was removed, their right to wages and their lien continued in force; that under the circumstances of the case the wages which were earned while they remained on board, and until the vessel was finally abandoned, did not constitute antecedent wages in a sense which would postpone them to the claim of the salvors; and that the proceeds of the outfit must be first applied to the payment of their demands, although it would have been otherwise had they abandoned the wreck before the salvage service was begun.

## SEARCY &amp; SCHUSTER v. McCHORD, Assignee, etc.

(District Court, D. Kentucky. March 4, 1880.)

**SALE—MISTAKE—ASSIGNEE IN BANKRUPTCY.**—A court of equity will set aside a sale by an assignee in bankruptcy where the purchaser has been innocently misled by the advertised notice of the sale.

In equity. Bill and cross-bill for specific performance. The bankrupt, Hardesty, was the owner of 180 $\frac{1}{4}$  acres of land in Washington county. Under an execution issued on a replevin bond the whole tract was, prior to the commencement of bankruptcy proceedings, sold for less than two-thirds of its appraised value to a man by the name of Hardin. Before the expiration of the year which Hardesty had for redemption he became a bankrupt, and defendant, McChord, was chosen assignee. McChord thereupon advertised, by printed handbills, that on a certain day he would sell at public auction "the right of redemption of said Hardesty in 180 $\frac{1}{4}$  acres of land, upon which said Hardesty now lives, situated in Washington county, etc. Said farm is in a high state of cultivation, and there is a good frame house and all necessary outbuildings thereon. Terms of sale: The right of redemption in the land, and the store-house, will be sold on a credit of three months, with interest from date, etc."

At the time and place mentioned in the advertisement he put the property up at public auction, and struck it off to the complainants at \$1,270. Complainants thereupon gave the assignee a note for this amount, and paid to Hardin, the purchaser at the execution sale, the amount paid by him at such sale, and 10 per cent. interest, amounting to \$880. At the maturity of their sale bond the assignee insisted that the complainants were bound to take the property at \$1,270, subject not only to the lien of Hardin, the purchaser at the execution sale, but also to the homestead right claimed by the bankrupt and his wife, and that they had no right to have this homestead right satisfied out of the proceeds of the sale.

The prayer of the bill is either for a specific performance—that is, a conveyance from the assignee free from the homestead, in case Hardesty and wife could be induced to make a

quitclaim deed of their homestead right; and, if not, for a rescission of the sale, a cancellation of the complainants' note, and a subrogation to Hardin's lien for \$880.

The bankrupt and his wife filed an answer claiming a homestead right in the property, and tendering a quitclaim deed to the assignee, conveying such homestead right and incohere right of dower of the wife of the bankrupt, to be delivered on payment by the purchaser of \$1,000.

The assignee, McChord, filed a general demurrer to the bill, and a cross-bill, in which he alleged, in substance, the same facts averred in the original bill, and that the sale was made in accordance with the advertisement, but construed the advertisement to mean that the assignee did not sell the land free from the homestead right, and tendered a deed conveying to the complainants the right of redemption of the bankrupt in the tract of land in question, and prayed for a decree directing the complainants to pay to him the whole note, and that he be relieved from all claims of dower and homestead in the premises.

To this cross-bill complainants demur.

*O. A. Wehle*, for complainants.

*W. O. & J. L. Dodd*, for assignee.

Brown, J. The question presented by the pleadings is whether the complainants are entitled to a decree for specific performance upon their view of the case, or whether the defendant is entitled to the purchase money agreed to be paid at the sale, regardless of the homestead right claimed by the bankrupt. It is a well settled principle of law that in judicial sales there is no warranty, and the rule *caveat emptor* is applied with full force. This was settled by the supreme court of the United States in the case of *Monte Allegre*, 9 Wheat. 616, and is the general doctrine in most, if not all, the states. Rorer on Judicial Sales, §§ 458 and 459. I see no reason why this rule does not apply to sales made by an assignee in bankruptcy. In such case the assignee making the sale is the mere agent of the court, having no power to bind any one but himself. This he may undoubtedly do in

case of fraud, or upon a conveyance with a warranty, and in such cases only. *Mockbee v. Gardner*, 2 Harris & Gill, 176.

I should find great difficulty in this case in holding that the assignee had bound himself personally by anything contained in this advertisement. He purports by this to sell "the right of redemption" of the bankrupt in the land in question, but he does not assume to guarantee that the property is not subject to other liens. While it may be true that, if the bankrupt himself had put forth this advertisement and sold the land, he would be estopped to set up a claim of homestead, the assignee stands in a somewhat different relation to the property. By the express provisions of the bankrupt act the homestead did not pass to the assignee, and he had no right or authority to sell it unless by the consent and joinder of the bankrupt and his wife, which was not given in this case.

But there is another ground upon which I think the complainants are entitled to a qualified relief. The terms of the advertisement were somewhat ambiguous, and I have no doubt that they were misled into supposing that they had acquired a title to the property free and clear of all encumbrances except that of the execution. It is true, that neither the bill nor the cross-bill set forth, in terms, that there was a misunderstanding as to the conditions of the sale, but taking them together it is quite apparant that there was. In such cases a court of equity has a judicial discretion to set aside the sale. *Rorer on Judicial Sales*, § 421; *Laight v. Pell*, 1 Edwards' Ch. 577; *Le Fevre v. Laraway*, 22 Barb. 167; *Vee-der v. Fonda*, 3 Paige, 94-97.

In *Anderson v. Foulke*, 2 Harris & Gill, 346, 357, it is said that in Maryland, as well as in England, "if there should be made to appear, either before or after the sale had been ratified, any injurious mistake, misrepresentation or fraud, the order of ratification will be rescinded, and the property again sent into the market and resold." This power has been frequently exercised in cases where the land was stated to be greater in quantity than it turned out upon actual survey; or where it was sold for a greatly inadequate price; or where

the auctioneer, intentionally or otherwise, misled the bidders as to the time when the sale would take place; or when, under any other circumstances, proposed bidders, without any negligence of their own, are prevented from attending the sale." I see no reason why this course may not be properly pursued in the case. While the assignee did not intentionally mislead the purchaser, the notice of sale would naturally lead a person to suppose that the property was to be sold subject to a certain lien and to that lien only, and the complainants in this case were in all probability misled by it.

It seems to me that substantial justice will be done by granting the complainants a decree setting aside the sale, and subrogating them to the rights of Hardin, the purchaser under the execution sale. The proper course will then be for Hardesty and wife to petition the bankrupt court for their exemption. This question being determined, the assignee will know exactly what he is to sell, and the purchaser what he proposes to buy. I express no opinion in this case as to whether, in fact, Hardesty and wife are entitled to the homestead claimed by them.

A decree will be entered in accordance with this opinion.

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### ELFELT v. HART.

(Circuit Court, D. Minnesota. February, 1880.)

CONTRACT—FRAUD—EQUITABLE RELIEF.—It is not always necessary for the injured party, even when fraud taints the contract, to rescind it in order to resist its full operation. He may permit the contract to be amended so as to conform to fair dealing, and if, under the pleadings and the relief prayed, a court of chancery can enter a decree which would be just and fair, and in accordance with equity, it will do so.

Action removed from state court, and heard, without change of pleadings, by consent.

*Gilman & Clough*, for plaintiff.

*Smith & Egan*, for defendant.

NELSON, J. The plaintiff brings this action to compel the



strict performance of the following agreement, alleging performance on his part and refusal by the defendant:

"CONTRACT.

"PHILADELPHIA, December 24, 1878.

"This is to certify that I have agreed and will, upon receipt of mortgage for \$2,000, (two thousand dollars,) with note, payable in three years, with interest at 6 per cent., payable semi-annually—the security of the above to be satisfactory—I will then give Abram S. Elfelt and Susan C. Elfelt a satisfaction of a mortgage dated July 20, 1876, of \$4,000, on the following described property, being a part of lot four, (4,) section twelve, (12,) township twenty-eight, (28,) range twenty-three, (23,) Ramsey county, Minnesota.

"ELEAZAR HART,

"or ELL HART.

"Witness: F. A. HOYT."

The defendant, in his answer, charges the plaintiff with fraud and misrepresentation in procuring the agreement, and avers that he was intentionally misled by the plaintiff in regard to the value of the property upon which he held the mortgage, and which was agreed to be released and satisfied, and that the plaintiff intentionally concealed facts in reference to a contemplated sale of the property mortgaged, which was partially completed; and that these fraudulent practices of the plaintiff induced him to sign the agreement, which he alleges is void and of no binding force.

This is the substance of the answer, to which a special reply is interposed, disclaiming the fraud charged.

The facts are these: The defendant held the note of the plaintiff for \$4,000, with interest at 6 per cent., payable semi-annually, executed July 20, 1876, payable three years after date, and secured by a mortgage upon property described as follows, and denominated the "Cave property," to-wit: Beginning at a point on the north boundary line of lot numbered four, (4,) of section numbered twelve, (12,) in town numbered twenty-eight, (28,) of range numbered twenty-three, distant six hundred and five and 54-100 feet west from

subsequent interview attempted to obtain the defendant's consent to a compromise which, in substance, was that the plaintiff would pay \$2,000 on the mortgage, if he could raise it or borrow it, and give a new note for \$2,000, payable in three years, giving a satisfactory security for the same by mortgage; and the defendant, in consideration therefor, should waive all accrued interest, and release the mortgage he then held from the property embraced in it, urging that on account of his financial condition he could make no better proposition, stating that "the property is all I have that I can use for the purpose of paying my indebtedness." On a subsequent meeting the plaintiff reiterated his former statement, and told the defendant "that in times like these I did not think I was asking too much to have the whole interest thrown off." The plaintiff also told the defendant that his ability to carry out the offer made to pay \$2,000 depended upon his ability to raise or borrow the money from a friend. The plaintiff finally induced the defendant to accept the proposition, and immediately went out to raise or borrow the money. He had in his possession a draft for \$2,000, and, proceeding to the office of Messrs. Young, Smythe, Field & Co., he exchanged his draft for their check on a Philadelphia bank, and, returning to the defendant, stated that he had borrowed the money (\$2,000) from a friend, and the agreement above set forth was executed by the defendant, and the \$2,000 check paid over by plaintiff. After obtaining the agreement to release the mortgage, the plaintiff, in his evidence, says: "I told the brother of Mr. E. Hart that I had already sold the property, and in reply to his question, why I had not told Mr. E. Hart, I answered I knew human nature too well; that, if I had done so, Mr. E. Hart would certainly not have made any reduction in interest."

The plaintiff, when he went to Philadelphia, obtained a statement of the amount of delinquent taxes, and, at the first interview, when the defendant said he was worried about the taxes, asked him "if, at the time he telegraphed about the taxes, he (plaintiff) had offered the property in payment of the mortgage, whether he would have accepted it," and re-

ceived a negative answer from the defendant, who said he could not afford to. The plaintiff, as he says, made the inquiry for the purpose of drawing out the defendant and ascertaining how much he needed the money, and what he could accomplish in the way of having the interest deducted. The defendant was exercised about losing the property on account of unpaid taxes, and the plaintiff exhibited to him the tax statements, evidently for the purpose of increasing his anxiety, and repeatedly told him he could not pay the interest. And he withheld from him the information that the property was already sold, because, as he says, "I did not wish to tell him. If I had, he certainly would not have been disposed to deduct the interest, and that was my only reason." He also told him "that the property had passed to the state, and could only be redeemed by him or myself."

The defendant received the \$2,000, signed the agreement, and on the next day discovered that the property had been sold. When the plaintiff came to obtain the release or give a plat of the property, to be embraced in the new mortgage, the defendant declined to carry out the agreement, saying that he had been deceived and misled; but he made no offer to restore the \$2,000.

These are the principal facts as they appear chiefly from the plaintiff's testimony. Leaving out the testimony introduced by the defendant, and examining the case upon the plaintiff's evidence, I do not think he is entitled, in equity, to a strict performance of the agreement by the defendant.

It is impossible to read the plaintiff's testimony without arriving at the conclusion that he desired to make a compromise to his own advantage, without putting the defendant upon the same level, and not only concealed facts which, if known, would, in his own opinion, have influenced the defendant's action, but also induced him to believe that no redemption of the property for non-payment of taxes could be made from the state by any one but the defendant and himself, when, at the time, the property had been sold, and, by the terms of the sale, the railroad company were to reserve from the purchase price enough to pay taxes and redeem the prop-

erty. Equity will not uphold such action, and no advantage can be obtained by such conduct.

While the counsel for plaintiff does not concede this, in terms, yet he urges that the defendant, having retained the \$2,000 received from the plaintiff under the contract, has affirmed it, and cannot, without placing the plaintiff in the position he occupied before the agreement was entered into, avail himself of facts which show that he was overreached and deceived, and that defendant cannot rescind the contract and retain the \$2,000 paid by the plaintiff, and, having retained it, has elected to affirm and abide by the contract.

The general doctrine is well stated that the party who has been induced to enter into a contract by fraud may either rescind or affirm it. If he rescinds, and has received something of value under the contract, he must restore the same to the other party. But it is not always necessary for the injured party, even where fraud taints a contract, to rescind it in order to resist its full operation. He may permit the contract to be amended so as to conform to fair dealing, and if, under the pleadings and the relief prayed, a court of chancery can enter a decree which would be just and fair, and in accordance with equity, it will do so. 2 Paige, 390; 1 Pet. 383.

The defendant had no knowledge of the sale of the property. He was anxious about the security of his loan, upon which no interest had been paid for over two years, and the land mortgaged forfeited to the state for non-payment of delinquent taxes. The plaintiff, while quieting his feelings about the taxes, was still making an effort to obtain a compromise with the defendant, and concealed information of the *status* of the property, and indirectly induced the defendant, through fear of loss, to consent to the compromise, while fair dealing required a frank statement from the plaintiff, so that the defendant would not be misled.

I think the defendant is entitled to the protection of the court and relief against the conclusive operation of the agree-

ment, so far as it had the effect to remit the interest which had accrued upon the loan.

The defendant accepted the \$2,000, and now retains it. There is no reasonable objection to the mortgage security tendered for \$2,000, and this is the correct test, in my opinion, of "satisfactory security" mentioned in this agreement. The only matter really in dispute is the interest on the sum of \$4,000 up to the date of the agreement, December 24, 1878; and the plaintiff has executed the new note and mortgage for \$2,000, drawing interest at 6 per cent. from December 24, 1878, bearing date April 24, 1879, and the same is now tendered, in court, to the defendant. The court has the subject completely before it—to enable a final determination of the case—and, upon full consideration, has come to the conclusion that a decree should be entered in the case in favor of the plaintiff conditionally. It is therefore ordered, that a decree be entered adjudging that the defendant, upon the payment of the sum of \$700 by the plaintiff—which is the amount of interest upon the original loan of \$4,000, computed to the date of the new agreement, and the interest upon the \$2,000 note tendered, up to December 24, 1879—execute and deliver a release and satisfaction of the \$4,000 mortgage; *provided*, that the property described in the new mortgage is free from all encumbrances, including taxes, and the title in the grantors.

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### WELLS v. THE SOUTHERN MINNESOTA RAILWAY COMPANY.

(Circuit Court, D. Minnesota. March, 1880.)

RAILROAD—FORECLOSURE DECREE—TERMS "SERVANT" AND "EMPLOYEE" CONSTRUED.—An act of the legislature of the state of Minnesota provided that in a foreclosure sale of a railroad, the court granting the foreclosure decree should provide in such decree, or otherwise, that the purchaser should "fully pay all sums due and owing by such \* \* foreclosed railroad company to any servant or employee of such company." *Held*, that the terms "servant" and "employee" did not include a secretary of such railroad company.

Cause tried before the court without a jury.

*H. Emmons and John B. Sanborn, for plaintiff.*

*H. J. Horn, for defendant.*

NELSON, J. The defendant company was organized after foreclosure and sale by the purchasers under an act of the legislature of the state of Minnesota, approved March 6, 1876.

This act contained the following proviso: "*Provided however, that such court (the court granting decree) shall provide in such foreclosure decree, or otherwise, that such purchaser or purchasers, shall fully pay all sums due and owing by such defaulting and foreclosed railroad company to any servant or employe of such company.*"

In 1872 a suit was commenced to foreclose the Southern Minnesota Railroad Company, as to part of its line, by the trustees, under certain mortgages given to secure the bonds issued by the company. On November 23, 1873, a receiver was appointed, who took possession of the mortgaged property. A decree of foreclosure was entered May 27, 1874, and on December 27, 1876, the decree was modified so as to allow a sale in the interest of second lien holders, subject to the lien of the first mortgage bondholders, and on sale being made, February 10, 1877, the defendant company was organized by the purchasers.

The plaintiff brings this suit to recover compensation at the rate of \$2,500 per annum, as secretary of the old company from June 1, 1874, at which time he claims he was elected, until June 19, 1876. At the time of his election the mortgaged property, including 167 miles of completed railroad, was in possession of the receiver, and the stockholders had no right to select their own agents for the management of the corporation; at least, the mortgaged property.

It is urged by the defendant that the act of March 6, 1876, which also contains this proviso, "that nothing herein contained shall be construed to change or impair the force of any decree of foreclosure heretofore made, or any of the terms or provisions thereof," relieves this defendant from the operation of this statute. It is unnecessary to decide this point,

as, from the view entertained, another objection is fatal to a recovery by the plaintiff.

The secretary, under the by-laws, is an officer of the company, and salaries due officers are not the "sums due and owing any servant or employe," which the new organization are required to fully pay.

The legislature intended to provide for the unpaid wages due servants or employes; that is, operatives of the grade of servants "who have not a different, proper and distinctive appellation, such as officers and agents of the company." See 37 N. Y. R. and cases cited.

The charter of the old company, and the various acts amendatory and relating thereto, as well as the act of March 6, 1876, recognize the distinction between officers and employes, and the latter act refers to the secretary as an officer in the same section which contains the proviso; and it is apparent that when certain persons are in the act designated officers, and are not expressly named in the proviso which requires the payment of sums owing "servants or employes," they are excluded from its operation. The word "employe" following "servant," is descriptive of the persons intended to be paid, and excludes officials to whom are entrusted the management of the corporation business.

The officers of the company are its representatives, and, it may be said, are the official masters who direct and control the servants and employes. The former are appointed or elected, and are trustees, (see 21 Wall. 624;) the latter are hired, and are the subordinates of the former.

Judgment ordered for defendant.

**BRECHER, Assignee, v. Fox and another.**

(Circuit Court, D. Minnesota. February, 1880.)

**BANKRUPTCY—PARTNERSHIP—MISAPPROPRIATION BY MEMBER OF INSOLVENT FIRM OF PARTNERSHIP ASSETS.**

Final hearing upon pleadings and proofs in suit in equity.

*Rogers & Rogers*, for complainant.

*Amos Cogswell*, for defendant *Emeline Fox*.

NELSON, J. The complainant, who is assignee in bankruptcy of *Melvin & Fox*, brought this suit against *J. R. Fox*, one of the bankrupts, and *Emeline Fox*, his wife. The prayer of the bill is, in substance, that the sum of \$624 be declared to be a specific lien and charge upon certain property, to-wit, lot seventeen, (17,) in block number seventeen, (17,) in the city of *Owatonna*, in this district, and that the same be sold under the directions of this court, and out of the proceeds the said sum be paid to the assignee, and for general relief. *J. R. Fox* and *William S. Melvin* were adjudged bankrupts on February 20, 1878, and the complainant was appointed assignee April 1, 1878, and duly qualified. It is clearly proved or admitted that on January 22, 1878, *J. R. Fox*, being at that time insolvent, paid out of his estate, or his interest in the assets of the firm of *Melvin & Fox*, which had come to him from the sale of firm property, without liquidating the firm indebtedness, a debt secured by mortgage upon the property above described, owned by his wife, the defendant *Emeline Fox*, and the mortgage was then canceled of record, and the title to the property now remains in her.

The answer avers that the mortgage debt was paid by *Fox* in good faith.

The only point in controversy is, could *J. R. Fox* rightfully use the proceeds of the firm property which had been assigned to him on a division, with the consent of his partner, for the purpose of paying this debt and discharging the lien upon his wife's property, while firm indebtedness to a large amount existed at the time, and the firm, and the individual members thereof, were insolvent? The facts bring this fairly



within the adjudicated cases, and the assignee is entitled to the sum claimed, as misappropriated. 16 B. R. 425; Id. 181; 5 Otto, 3; 7 Otto, 304.

A decree will be entered as prayed for, unless within 30 days the defendants, or either of them, pay over \$624 to assignee. The costs will be divided.

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CHAPMAN, Executor, etc., v. BORER, Administrator, etc., and others.\*

(Circuit Court, D. Minnesota. February, 1880.)

JURISDICTION—CONCURRENT JURISDICTION OF THE CIRCUIT AND PROBATE COURTS—PAYNE V. HOOK, 7 WALL. 426, FOLLOWED.—In a suit against the administrator of an executor, by the citizens of another state, to enforce the payment of a judgment obtained against the decedent in such state, during his lifetime, and subsequently sued upon in the circuit court for the district of Minnesota, and judgment obtained thereon against the executor of the decedent, such circuit court has concurrent jurisdiction with the probate court of the state of Minnesota in which the wills of the decedent and the deceased executor have both been probated.

Demurrer to bill of complaint.

*H. J. Horn and I. V. D. Heard*, for complainant.

*Gilman & Clough*, for defendants.

NELSON, J. This is a demurrer to a bill in equity filed by the complainant George M. Chapman, executor, etc., a citizen of the state of New York, against the defendants Felix A. Borer, administrator of the estate of John Gordon, deceased, Edson R. Smith, executor of the estate of George D. Snow, deceased, and others, citizens of the state of Minnesota.

The bill seeks to enforce the payment of a judgment obtained against John Gordon, in the state of New York, during his life-time, subsequently sued upon in this court, and a judgment obtained against George D. Snow, his executor, now deceased, to be paid out of assets in his hands. Legatees, residuary and otherwise, are made parties defendant.

\*See *Levi v. Columbia Ins. Co.*, ante, 206.

A demurrer is interposed, and it is urged this court has no jurisdiction; and proceedings, at least, against the executor and administrator should be instituted in the probate court of Le Sueur county, in the state of Minnesota, where the will of John Gordon was probated, as also the will of George D. Snow, the executor of Gordon's estate.

The concurrent jurisdiction of this court as a court of equity is undoubted. 1 Curtis, 178; 5 Mason, 95; 10 Howard, 56-70; and 7 Wall. 426. John Gordon's estate is liable for the payment of his debts, (see Minn. Rev. St., 570, § 26,) and the executor Snow, to the extent of the assets, was a trustee for creditors. If Borer, the present administrator, has not sufficient assets, the representatives of Snow must respond if sufficient assets of Gordon's estate have passed into their hands.

The bill of complaint alleges that Snow, in his life-time, received a large amount of assets from Gordon's estate, and that all the legacies and debts except this judgment have been paid. I think it not doubtful that this court, the complainant being a citizen of another state, can, under the circumstances set up in the bill, entertain jurisdiction, and follow the property in the hands of legatees, or the representatives of Gordon under the will, to secure payment of the judgment, and in so doing make the administrator of Gordon and the executor of Snow parties to this bill of complaint. If the entire assets of a decedent's estate are in the hands of an executor or other trustee ready for distribution, and a demand is made by one or more distributees, which is refused, and the trustee will not account, I think this court, in a proper case, could enforce a distribution. The same principle is involved here. The jurisdiction of the probate court is not exclusive in such a case, as the bill in equity foreshadows. I understand the decision in *Payne v. Hook*. 7 Wall. 426, to go to this extent, without reference to the peculiar *status* of the probate court of Missouri.

Demurrer overruled, and defendants have until April rule day to answer.

BECHER and others v. THE WELLS FLOURING MILL Co. and others.

(Circuit Court, D. Minnesota. March, 1880.)

CORPORATION—ASSIGNEES OF STOCK CERTIFICATES—SHARE-HOLDERS—TRANSFER UPON THE BOOKS OF THE CORPORATION.—The assignees of stock certificates in a corporation, by assignment from persons to whom the certificates were originally issued, are not, by virtue of such assignment, share-holders, when the transfer of shares is required to be made upon the books of the company.

SAME—SAME—EVIDENCE AS TO CHARACTER OF ASSIGNMENT.—Evidence is admissible in behalf of the corporation to show the true character of such assignment in order to determine the relation of the assignees.

SAME—SAME—ULTRA VIRES—INJUNCTION.—An injunction will be refused, upon the prayer of such assignees, for the purpose of restraining such corporation from holding a meeting in order to increase the corporate debt, or from increasing such debt until the stock in controversy has been transferred to the assignees upon the books of the company, or from voting upon the stock thus assigned, where it appears that the stock was merely pledged by the assignment of the certificates, and it was manifest that the proposed increase of the corporate debt was not *ultra vires*.

Application for injunction, *pendente lite*. Motion to dismiss the plaintiffs' bill upon the hearing.

*Davis, O'Brien & Wilson*, for plaintiffs.

*M. W. Green*, for defendants.

NELSON, J. A suit in equity is brought by the complainants, claiming to be stockholders in the defendant corporation by virtue of certain certificates of stock assigned to them by the persons to whom they were originally issued, and who appear as owners on the books of the corporation. The certificates are not only assigned to the complainants, but written direction is given to the secretary of the corporation to make the necessary transfer upon the books. These certificates represent 109 shares of the stock—40 shares assigned to E. J. Becher, and the remainder to L. A. Becher. The relief prayed for is that the corporation and other defendants, officers and stockholders, may be enjoined from calling or holding any meeting of the company for the purpose of increasing the debt of said corporation; from increas-

ing such debt until after this stock has been transferred to the complainants upon the books of said company; and that the said defendants, and each of them, may be restrained and prohibited from voting upon any stock so, as aforesaid, assigned to complainants; and from further increasing the debt of said company by any proceeding, or in any manner whatever, until the further order of the court. A perpetual injunction is also prayed for, as well as general relief.

The defendant corporation was organized under the laws of the state of Minnesota, (Minn. Rev. St. 396,) and has been in operation since May 30, 1879, incurring an indebtedness, up to this time, for improvements and milling machinery, to the maximum allowed by the articles of association.

It is proposed to call a meeting for the purpose of increasing the stock of the corporation, in accordance with the law, to meet the demands of business, and no notice has been given the complainants.

It is pretty well settled that the assignees of stock certificates in a corporation, by assignment from persons to whom the certificates were originally issued, are not, by virtue of such assignment, shareholders, when the transfer of shares is required to be made upon the books of the company. See Field on Corporations, 75; Angel & Ames on Corporations; Minn. Rev. St. 398, § 135.

The mere assignment gives the assignee an equitable title only, except as against the assignor. The certificates do not constitute property in the corporation; they are the muniments of title, but it is the shares of stock which constitute the property, and the persons whose names appear upon the books of the corporation are presumed to be the stockholders; they have the right to vote and participate in directing the policy of the company. The corporation has not recognized the complainants as stockholders, and thus waived any right to require such registry, and the affidavits read on the hearing do not make it clear that a demand for the transfer of the stock was ever made. If it was, and there was a refusal to comply, legal proceedings would undoubtedly secure to the complainants the proper relief. It is clear that if this court

has jurisdiction of the case to grant other equitable relief prayed it could also entertain a claim for damages on account of a refusal to make the proper transfer. This disposes of the preliminary motion to dismiss the bill.

It appears from the affidavits read that complainants, being the owners of a flouring mill in the village of Wells, Minnesota, sold it to the defendants Eaton, Thombs, Barnes, Southwick and Stevens, who organized, under the laws of the state of Minnesota, the corporation called "The Wells Flouring Mill Co." They paid a part of the purchase price and gave notes for the balance, pledging, as collateral security for payment, shares of stock, viz.: Twenty-five shares owned by Eaton, 20 shares owned by Southwick, 15 shares owned by Stevens, and 9 shares owned by Barnes, were assigned and pledged to L. A. Becher; and 40 shares, owned by Thombs, were assigned and pledged to E. G. Becher. The Southwick shares, by the terms of the pledge, became absolutely the property of L. A. Becher on failure to pay his obligations.

It is objected that these affidavits should not be received to vary or change the absolute assignment of the shares expressed in writing on the certificates. Whatever the rule may be, as between the assignors and assignees, I think the corporation can show the true character of the contract of assignment, and thus determine the relation of these assignees of stock certificates. If the shares of stock are merely pledged by the assignment of the certificates, the holders would not be entitled to the rights, nor subject to the liabilities, of the owners of shares; they could only become owners by a sale and purchase of the stock pledged, on failure of the pledgors to pay the debt.

The pledgees holding the certificates, and the corporation having notice thereof, it will be liable for any transfer upon the books of the company, of the pledged stock, without their consent. The bill charges that the defendants propose to increase the indebtedness of the company wrongfully and unnecessarily, but the opposing affidavits controvert this allegation.

It is clear that the stockholders have a right to increase

the stock, or indebtedness, of the corporation, if such policy is regarded necessary for the interests of the company. See Minn. Rev. St. 396, § 121; Laws Minn. 1875, p. 53.

A court of equity will not interfere with the internal policy of a corporation unless it is manifest that the proposed act is *ultra vires*. I am not satisfied, from the affidavits read at the hearing, that an increase of stock will cripple the corporation and make it insolvent, or that an increase of indebtedness may not be proper. There is no fraud or conspiracy on the part of the defendants, who are stockholders, to injure the complainants. I have not considered the question whether the complainants are entitled to any equitable relief, but, for the purposes of this motion, concede it.

An injunction is refused, and the restraining order is dissolved.

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MEGUIAR, Trustee, etc., v. GROVES and others.

(District Court, D. Kentucky. March 4, 1880.)

SURETIES—CHATTEL MORTGAGE—EXTENSION OF TIME OF PAYMENT—

EVIDENCE.—A chattel mortgage, partly given to secure a pre-existing debt, will not discharge the sureties of the debtor, unless such mortgage purports upon its face to extend the time of the payment of the debt for a definite period.

*W. O. & J. L. Dodd*, for plaintiff.

*D. W. Armstrong*, for defendants.

BROWN, J. This is a bill in equity to foreclose a mortgage given by Meriah L. Mayes and John B. Mayes, her husband, to F. S. J. Ronald, of whom the complainant is trustee in bankruptcy. This mortgage was given by Mayes and wife, upon the property of the wife, to secure a note for \$2,000, dated January 26, 1875, payable to Ronald, and made by Groves as principal, and Mayes and wife as sureties. Mayes and wife have answered, and pleaded in defence (1) the coverture of Meriah L. Mayes at the date of the note and mortgage; (2) that the mortgage was without consideration as to the said Meriah L. Mayes and John B. Mayes, but was given

for the accommodation of Groves, to secure an antecedent indebtedness; (3) that in consideration of a mortgage from Groves to Ronald, made September 18, 1876, to secure the same debt and a further indebtedness of \$1,000, the said Ronald bound himself to, and did extend the time to, Groves within which to pay said note, and agreed to forbear suit thereon without the knowledge and consent of said sureties, and that they were thereby released; (4) that the said Groves has paid on account of said note, on the sixteenth of November, 1876, \$400, and on the fourteenth of February, 1877, \$739.65; (5) that Groves shipped tobacco to Ronald for sale sufficient to pay said note, and instructed him to so apply it, which he failed to do.

So far as the foreclosure is concerned, the first, second and fifth defences were abandoned upon the hearing. The claim of payment of \$400 on the sixteenth of November, 1876, set up in the fourth defence, was also abandoned, the proof being clear that Groves paid Ronald the \$400 as a part and on account of a purchase that day made by Ronald, of Groves & Shurley, for Groves' accommodation. It seems that Groves & Shurley claimed that Groves was indebted to them in about the sum of \$5,000; that Ronald undertook to settle and did settle the claim for \$1,100, and paid \$500 in cash, of which Groves advanced him \$400 on the sixteenth of November, 1876.

The payment of \$739.65 of February 14, 1877, is still insisted upon, but, in my opinion, it is not made out by a preponderance of testimony that such payment was ever applied, or intended to be applied, upon the note in suit. Defendant Groves was a farmer and tobacco speculator, and Ronald was the senior member of the firm of Ronald & Co., composed of F. S. J. Ronald and his son W. A. Ronald.

The business of this firm was that of tobacco warehousemen and commission merchants. In January, 1875, Groves applied to them to advance him money to be used by him in the purchase of tobacco, which he was to consign to them. They exacted of him a reasonable security, as indemnity against loss, before they would open an account with him.

and the note and mortgage in controversy were given, and Ronald & Co. appeared to have advanced him, upon the day following the execution of the note and mortgage, \$2,000, and other sums thereafter to the aggregate amount of about \$12,000, from which, deducting credits of somewhat over \$9,000, there is still claimed to be a balance due of \$3,500. The relative business of the two parties consisted in Groves making purchases of tobacco upon advances made by Ronald & Co., and consigning the tobacco to them at Louisville for sale; when sold, the amount would be credited upon Groves' indebtedness to them.

On the twenty-third of January, 1877, Ronald, Webb & Co., the successors of Ronald & Co., were adjudged bankrupt, and complainant was, by consent of their creditors, chosen trustee. The payment was made to complainant on February 14 of the same year. Meguiar swears that Groves shipped him tobacco which sold for \$900, without any direction as to the proceeds; that when he sold it Groves was present, and wanted all the net proceeds; that he handed him \$160 in cash, and told him he would credit the balance on his account, then held by him as trustee, to which no objection was made by Groves, and it was so credited. Groves swears that he instructed Meguiar to apply this upon the Mayes note. Meguiar admits a conversation of this kind, but says it took place several months after he had received the money, and applied it generally upon Groves' account; that having given the credit upon the account generally, he refused to change it. This theory seems to me much the more probable, not only because such had been the general course of their business, but also from the fact that Meguiar did not have the Mayes note, nor know of its existence at the time the sale of the tobacco was made, and indeed did not even have the note when, as he says, Groves, several months afterwards, requested him to credit the amount upon it.

The more serious question in this case arises from the alleged extension of time and consequent release of the sureties, by reason of a chattel mortgage given on September 18,



1876, to W. A. Ronald, the surviving partner of Ronald & Co., for \$3,000. Groves swears positively that, finding himself indebted to Ronald in somewhat over \$3,000, an agreement was made to extend the time on the Mayes note, and forbear suit, without the knowledge and consent of the sureties, by giving a chattel mortgage upon a quantity of live stock then owned by him, it being understood, as he says, that the live stock should remain in his possession, and, when fattened and sold, the proceeds should be paid over to Ronald in settlement of his claim. It seems, however, that the hogs all died of cholera, and the mortgage, when foreclosed, realized less than \$200.

Did the giving of this mortgage extend the time for the payment of the Mayes debt? It certainly did not upon its face. It recites "that whereas, the said Groves is indebted to said Ronald in the sum of \$3,000, *now due and payable*: Now, to secure the due payment of said sum, the said Groves hereby sells and conveys unto the said Ronald, etc. \* \* \* *provided*, however, should the said Groves pay, or cause to be paid, the sum of \$3,000, and the interest thereon, then this mortgage to be null and void, otherwise to remain in full force and effect."

It is well settled that, in order to release sureties, the agreement to extend the time must not only be given for a consideration, but it must be a *binding* agreement. There is evidence in this case tending strongly to show that this mortgage was in reality made by Groves to protect his property from his other creditors; but, granting that the mortgage was executed for a valuable consideration, was there a binding agreement to extend the time?

As before observed, the mortgage does not purport to do so upon its face. No time is fixed for payment, and the rule in such cases is that the paper is payable immediately. 1 Dan. on Negotiable Instruments, §§ 88, 599; *Cornell v. Moulton*, 3 Den. 12. And parol evidence is not admissible to show that it was to be paid at a future date. *Thompson v. Ketchum*, 8 John. 190; 1 Par. on Bills, 381; 2 Phillips on Evidence, 675; 1 Dan. on Negotiable Instruments, § 80. So, if a prom-

issory note be made payable on demand, evidence that it was payable at some other time, or upon a contingency, is inadmissible. 2 Par. on Bills, 504; 1 Dan. on Negotiable Instruments, § 80; *Free v. Hawkins*, 8 Taunt. 92; *Woodbridge v. Spooner*, 3 B. & Ald. 283.

These authorities seem to demonstrate that, if Ronald had seen fit the next day to file a bill to foreclose this mortgage, Groves could not have shown in defence a parol agreement that no action should be taken upon it until his stock had been sold. If such be the case, then it clearly did not operate to extend the time for the payment of Mayes' debt. Again, in order to release the sureties the extension must be for a definite time. Brandt on Guaranty, § —.

I think it extremely doubtful whether, upon Grove's own statement, the time for payment was fixed with sufficient certainty. It depended upon a contingency which might happen within a week, and might be postponed for months.

I think the complainant is entitled to a decree.

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THE STATE OF MISSOURI, etc., v. MERRITT and others.

(Circuit Court, E. D. Missouri. March 17, 1880.)

REMOVAL OF CAUSE—ACT MARCH 3, 1875—TERM PRIOR AND TRIAL SUBSEQUENT TO PASSAGE OF ACT.—The right to remove a cause from a state court, under the act of March 3, 1875, is lost where such cause was tried in a term which began before, but at a date which was subsequent to, the passage of that act.

Motion to remand the cause to the state court.

*Cane, Jamison & Day*, for plaintiff.

*George P. Strong*, for defendants.

McCRARY, J. This cause is brought here by removal from the circuit court of the city of St. Louis, and the motion now before us is to remand it to that court, for the reason that the petition for removal was not filed within the time prescribed by the act of congress of March 3, 1875.

The third section of that act requires that the petition for

removal shall be filed "in such state court before or at the term at which said cause could be first tried, and before trial thereof." In this case the facts are that the act of congress took effect March 3, 1875, at which time this cause was pending in the state court, which was then in session. The term of the state court began in February, 1875, several weeks before the passage of the act, and continued some months after its passage. On the tenth of March, 1875,—seven days after the passage of the act,—the case was tried, and there was verdict and judgment for the plaintiff. The cause was taken by writ of error to the court of appeals, and thence to the supreme court of Missouri, and, having been reversed, was in January last remanded to the circuit court of the city of St. Louis for re-trial. Thereupon, on January 31st last, it was, upon petition of defendant, removed to this court. Was the February term, 1875, of the said state court, "the term at which said cause could be first tried," within the meaning of the act of congress? The position of the counsel for the defendant is that the term of court intended by the statute is a term *beginning* after the passage of the act, and to sustain this view he has cited numerous authorities, which are cited in the note of this opinion. I have examined these cases and do not find that they have the effect claimed for them by counsel.

Some of them hold that where a case was tried before the passage of the act, and a new trial was granted subsequent to its passage, a petition for removal was in time if filed at any time before the first term at which such second trial could be had; and others hold that where the case was pending when the act took effect, and for one or more terms before, and the petition for removal was filed at or before the first term thereafter at which the case could be tried, it was in time. In substance, the rule established by the adjudications is that the act applies to cases pending at the time of its passage, and there shall be an opportunity to apply it to all such cases. But no case has been cited which holds the right of removal was not lost by voluntarily going to trial in the state court after the passage of the act, and I am certainly not

disposed to go to this length unless constrained by a ruling of the supreme court. The statute not only requires the petition for removal to be filed "at the term at which said cause could be first tried," but also that it be filed "before the trial thereof." If it be regarded as settled that this language refers to a trial after the passage of the act, (and no case has gone further than this,) it does not follow that it refers to a trial at a term of court *commencing* after the act was passed. By its terms, and by its evident spirit and intent, it applies to a trial after the passage of the act, but during a term of court commencing before.

The motion to remand is sustained.

NOTE.—*Meyer v. Delaware R. Construction Co.* U. S. Sup. Court, October term, 1879; *Am. Bible Society v. Grove et al.* U. S. Sup. Court, October term, 1879; *McCullough v. Sterling Co.* 4 Dillon, 562; *Hoadley v. San Francisco*, 3 Law, 553; *Crane v. Reeder*, 15 Albany L. J. 103; *Andrews' Ex'rs v. Garrett*, 2 Cent. L. J. 797; *Rain v. R. Co.* 3 Cent. L. J. 12.

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P. P. MARRION BLACKSMITH & WRECKING CO. v. THE STEAMBOAT "H. C. YAEGER."\*

(Circuit Court, E. D. Missouri. March 20, 1880.)

ADMIRALTY—JURISDICTION—HOME PORT—SERVICES TO STRANDED BOAT.

—Services rendered a steamboat stranded upon a bar in the Mississippi river, some 65 or 70 miles below St. Louis, in a voyage from that port to New Orleans, are not to be regarded as having been rendered in her home port, although such boat may have been at the time within the territory of the state of Missouri.

SERVICES RENDERED AT REQUEST OF MASTER—PRESUMPTIONS.—Where such services were rendered at the request of the master, it will be presumed that they were necessary, and properly rendered on the credit of the vessel.

CLAIM FOR SERVICES—ASSIGNMENT.—The owners of one-half of the claim for such services, who have obtained the other half by assignment, are entitled to sue for the whole.

LIEN—SALVAGE.—Although the services rendered were not in the nature of salvage, the right of the libellants to a lien was not thereby affected.

\*See *Monongahela Nav. Co. v. Steam Tug "Bob Connell,"* ante, 218.

In admiralty. Appeal from the district court

*B. H. Kern*, for libellants.

*W. F. Smith*, for appellant.

MCCRARY, J. The steamboat "H. C. Yaeger" left the port of St. Louis about the twenty-fourth of November, 1878, bound upon a voyage down the Mississippi river to New Orleans. On the way she grounded at a place called Kaskaskia Bend, about 65 or 70 miles below St. Louis. After making unsuccessful efforts to free his vessel from the bar on which she was fast, the master engaged the services of the tug-boat "Wild Boy," then in the neighborhood, and owned by the libellants, though chartered to Burgess & Co., on terms to be hereafter stated. The tug, with a small crew, went to the relief of the "Yaeger," taking a barge along-side, into which a portion of the cargo was placed, and after some hours' labor the vessel was pried from the bar on which she was grounded and enabled to proceed upon her voyage. The officers of the two vessels could not agree as to the price to be paid for these services, and hence this suit. There was judgment below for \$350 and the claimants appeal. Upon due consideration I have reached the following conclusions:

1. That under the circumstances the steamboat "Yaeger" is not to be regarded as having been in her home port at the time the services were rendered. She was not in port, but launched and afloat, proceeding on her voyage, and, therefore, clearly within the admiralty jurisdiction, whether within or without the territorial limits of the state of Missouri.

2. The fact that the services were rendered at the request of the master, and for the purpose of relieving the vessel from her stranded condition, raises a strong presumption that they were properly rendered on the credit of the vessel, and were necessary; and the claimants, in order to overcome this presumption, must show affirmatively that the credit was given exclusively to the owners. This they have not done.

3. At the time the service was rendered the tow-boat "Wild Boy" was in the possession of Burgess & Co., who had chartered it. These charterers were to pay the owners \$20 per day, and one-half of what was earned by the boat in such

service as that now in controversy. The libellants, therefore, who are the owners of the "Wild Boy," were the owners of one-half the claim originally, and, having obtained the other half by assignment, my opinion is that they are entitled to sue for the whole.

4. Whether the service was in the nature of salvage or not, makes no difference as to the right of libellants to a lien. If, however, this were a case of salvage, they might recover extra compensation. In my opinion the circumstances were not so extraordinary, nor the peril sufficiently great, to justify an extra allowance, on the theory that the services were in the nature of salvage. I am strengthened in this view by the fact, which appears in evidence, that the bill, as at first presented by the master of the "Wild Boy," was for \$175—only the evidence is very conflicting as to what would have been a reasonable compensation, as it is also upon the question whether there was a contract to render the service at \$7 per hour; but, inasmuch as the sum of \$175 was originally fixed by the master of the tug, who was the person who made the contract and rendered the service, and, inasmuch as that is about the sum that is established by the weight of the evidence, I have adopted it as the amount of the libellants' recovery.

The decree below is modified accordingly, and the vessel is charged with a lien for \$175, with interest and costs.

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IN THE MATTER OF WALRUP, Bankrupt.

(Circuit Court, E. D. Missouri. March 20, 1880.)

**SALE—FALSE PRETENCES—RATIFICATION.**—The refusal of a vendor to take back goods obtained by false pretences, in order to obtain a preference over other creditors, amounts to a ratification of the sale.

In bankruptcy. Appeal from district court.

Jacob Klein, for assignee.

Patrick & Frank, for petitioners.

McCrary, J. This is a petition filed by J. Weil & Bro. praying an order against the assignee of John Walrup, bankrupt, directing him to return to petitioners certain dry goods sold and delivered by them to the bankrupt prior to the commencement of the bankruptcy proceedings. This order is asked upon the ground that the goods in question were obtained by the bankrupt from the petitioners by means of false representations as to his financial condition. There is some doubt upon the question whether the proof shows that the bankrupt obtained the goods, not intending to pay for them, and this, according to the ruling of the supreme court in *Donaldson, Assignee, v. Farwell*, 93 U. S. 631, must appear. It is not, however, necessary to go into the proof upon that question, for the case may well be determined upon another point. It is very clear that the vendor, who has been induced by fraudulent and false representations to part with the goods, must, upon discovering the fraud, promptly disaffirm the contract in order to be entitled to a return of the property. In this case it appears, from the report of the register, that the petitioners not only did not comply with this requirement of the law, but that they failed to take back the goods when the bankrupt offered to return them. The register, in his report, says:

"The facts appear to be that on receiving notice from the debtor of the proposed meeting of creditors for the purpose of securing an extension, as heretofore stated, one of the members of petitioners' firm called in person upon the debtor, *who then made a proposal to return the goods*, they then being, as now, in unbroken packages; and after some parley between the parties no final action was taken."

The character of this parley we may gather from the further facts stated by the register, that "there is some evidence tending to show that at the time of this interview the petitioners endeavored to secure from the debtor some arrangement by which their claim would be protected," etc. I have no doubt that an attempt to secure the debt, or to obtain a preference, after knowledge of the fraud, would amount to an affirmance of the sale, even if not accompanied by a refusal

to take back the goods. It is apparent, that when this offer to return the goods was made, the petitioners knew that the bankrupt had misrepresented his financial condition in order to obtain them. The fact of his offering to return the goods, in connection with his calling a meeting of his creditors and acknowledging his insolvency, was enough to advise the petitioners that the representations he had made to them were false. It was their duty, therefore, to accept the offer when made, and they failed to do so at their peril. If they failed to accept them for any reason except ignorance of the facts it was an affirmance of the sale, and, *a fortiori*, it was an affirmance if they refused in order to continue negotiations for securing a preference.

The judgment of the district court, denying the prayer of the petition, is affirmed.

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GREEN v. BETTS and another.

(Circuit Court, E. D. Missouri. March 24, 1880.)

**VENDOR'S LIEN—ASSIGNMENT—FAILURE OF CONSIDERATION—SPECIFIC PERFORMANCE.**—A partial failure of consideration does not render the assignment of a vendor's lien void, and the assignor cannot subsequently seek to enforce the lien by a suit for specific performance before such assignment has been duly avoided.

Suit to enforce vendor's lien upon specific real estate.

*Wagner, Dyer & Emmons*, for complainant.

*W. B. Homer*, for defendant.

MCCRARY, J. This is a bill in chancery, brought to enforce a vendor's lien upon certain real estate described in the petition. The following are the material facts: On the twelfth day of September, 1873, the plaintiff and defendant Betts entered into a written agreement for an exchange of real estate, by the terms of which plaintiff agreed to convey to said defendant his farm in Carroll county, Missouri, on which he then resided; and the defendant Betts, on his part, agreed

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to convey to plaintiff several designated tracts of real estate, including one which is averred to be with no other description—"160 acres of Missouri land, with perfect title."

It is averred in the bill that defendant Brewster was a party to the transaction, although not signing the contract, and that the farm in Carroll county, Missouri, above named, was, by consent, conveyed to him instead of Betts, and that he had notice of plaintiff's claim. It is conceded that the contract has been complied with in all respects, except as to the conveyance of the 160 acres of Missouri land. Concerning this latter, which is the subject of this controversy, the facts, so far as they need now to be determined, are as follows: The plaintiff, by an instrument in writing which is not dated, but which was executed prior to January 7, 1874, assigned his claim for the said 160 acres of Missouri land to one J. S. Winfrey. This assignment was in the form of an order, addressed to defendant Betts, directing him to make the deed for said land to Winfrey, and signed by the plaintiff. On the seventh of January, 1874, it was assigned by Winfrey to John Dickinson, and on the fourteenth of March, 1874, it was presented to and duly accepted by defendant Betts. Thus the matter stood when, on the thirty-first of December, 1878, this suit was brought. On the first of August, 1879, seven months after the filing of the bill in this case, the order was assigned by Dickinson to the plaintiff.

It is insisted for the defence that these facts show that plaintiff did not own the cause of action at the time he brought the suit, and that therefore he cannot recover, in view of the well settled rule that the plaintiff in a suit must recover, if at all, upon the facts as they existed when he commenced proceedings. *Reppy v. Reppy*, 46 Mo. 571; *McDowell v. Morgan*, 33 Mo. 555; *Waterman on Set-Off*, 414. But it is insisted by the counsel for plaintiff that the case does not fall within this rule, because the assignment from Green to Winfrey was fraudulent and void. The proof upon this subject is that the consignment was executed in assideration of the purchase by plaintiff from Winfrey of the right to use and sell a certain patented article within a specified territory.

The plaintiff testifies that a portion of the territory had been previously sold, and that he was therefore defrauded; but he does not claim that all the territory had been previously sold, nor that the consideration for the assignment wholly failed. On the contrary, he admits that he made sales under the patent, and received some money therefor, though the amount is not specified.

It is evident, from the plaintiff's own statements upon this subject, that the contract of assignment was voidable only, and not absolutely null and void. It was not a transaction which he could of his own notion disregard *in toto*. He could not proceed to sue upon the contract as if it had never been assigned. It was probably a case in which the plaintiff had the right to rescind the contract by taking the necessary steps. But to do this he was bound to return, or offer to return, whatever of value he had received under the contract. He was bound to do whatever was in his power to place the parties in *statu quo*. Bishop on Contracts, § 203, and cases cited in note.

But it is further insisted that the proof shows that after the execution of the assignment, and while it was outstanding, the plaintiff demanded a deed from Betts, and notified him that the assignment to Winfrey was fraudulent, and that Betts then agreed virtually to convey to plaintiff, and did not insist upon the objection that the assignment and his acceptance thereof were outstanding. Here there is a serious conflict of testimony, but my conclusion is that the new promise is not established. Nor could it be upheld if proved, as it seems to have been without consideration. Besides, all the probabilities are against the correctness of plaintiff's version of this transaction.

It is not at all probable that Betts, with a knowledge that the assignment, with his written acceptance thereon, was outstanding, voluntarily agreed to make the deed in disregard thereof, and at his own risk. These considerations lead inevitably to the conclusion that the plaintiff did not own the cause of action when the suit was brought.

Counsel have discussed several other questions, to-wit: (1)

Whether there is sufficient proof of notice to Brewster; (2) whether the vender's lien was lost by his assignment of the claim for balance of the purchase price; (3) whether the plaintiff, if entitled to a lien, should recover the sum claimed (\$1,180) and interest, or only the actual value of the 160 acres of Missouri land.

The ruling upon the question first discussed renders it unnecessary to pass upon any of these questions. I may remark, however, that there is a serious conflict of authority upon the question, whether a vendor's lien can be assigned, (see *Macketti v. Symmons*, *White & Tudor's Lead*. Cases in Eq. 235,) although the plaintiff cannot recover in this proceeding, because he had no cause of action when the suit was commenced; yet, as he has since come again lawfully into possession of the claim, and now owns it, I think it right to dismiss the suit, without prejudice, at plaintiff's cost, and it is so ordered.

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GAUSE and another v. KNAPP and another.

(Circuit Court, E. D. Missouri. March 24, 1880.)

PLEADING—CERTAIN RULES RESTATED.—(1) In pleading, the parties respectively must aver the issuable facts and nothing more; (2) if a pleading has not sufficient issuable facts to constitute a cause of action or defence, or is mixed with statements as to evidence to support the same, the opposite party may demur; (3) if a pleading is so vague and confused that the material and immaterial allegations are intermixed, or a mass of statements are contained therein, some issuable and others non-issuable, the opposite party may move to make the pleading more definite and certain; (4) but motions to strike out special clauses and sentences in a pleading will not be entertained.

Motion to strike out a special defence.

*Dryden & Dryden*, for plaintiffs.

*Vernon W. Knapp and McComas & McKeighan*, for defendants.

MCCRARY, J. This is a motion to strike out a special defence. This cause was before the court at a previous term, Judge Dillon presiding, at which time it was suggested that

the questions designed to be raised could be presented in a better form under a special answer. Since then an amended petition and an answer thereto have been filed.

It is of importance, not for this cause alone, but for the general practice of the court, that the modes of proceeding should be clearly understood, and I therefore take this occasion to restate some well settled rules which prevail in this court.

Mr. Justice Miller, at an early day, with the concurrence of Judges Dillon and Treat, held :

*First.* That in pleading, the parties respectively must aver the issuable facts and nothing more.

If irrelevant and redundant matter is inserted in the petition or answer the court will not entertain a motion to eliminate the same, but will receive a motion to make said pleading more certain and definite. The reason for this ruling is based not only on the essential requisites of good pleading, but on the duty of attorneys to so plead as not to drive the opposing attorney, with the aid of the court, to do the pleading for the party. The function of the court is to pass upon the papers filed, and not to become the pleader for the parties. Let the plaintiff and defendant respectively come to an issue, not on matters of evidence, relevant or irrelevant, but on the ultimate facts, determining their respective rights. There is nothing in the Missouri practice act which abrogates those essential rules of pleading. The very object of pleading is to bring the parties face to face with the issuable facts on which their rights depend.

*Second.* If a pleading has not issuable facts sufficient to constitute a cause of action or a defence, or is mixed with statements as to evidence to support the same, the opposite party may demur; so that the court, disregarding the irrelevant matter, may determine whether the alleged cause of action or special defence has any foundation in law.

*Third.* If the vicious pleading is so vague and confused that the material and immaterial allegations are intermixed, or a mass of statements are contained therein, some issuable

and others non-issuable, the proper practice is a motion to make the pleading more definite and certain.

*Fourth.* Motions to strike out special clauses or sentences in a pleading this court will not entertain, for it cannot determine, in advance of the trial, to what issuable facts they may pertain; nor will the court, through such motions, be driven to the necessity, after repeated experiments, of doing practically the pleading for the party in default. This court recognizes, therefore, demurrers and motions to make pleadings more definite and specific. A motion to strike out, if admissible at all, must be directed to an entire pleading, or a whole count or division. Matter appearing to be scandalous would form an exception to the rule.

There is a very important consideration in this ruling, which every good pleader will recognize, viz.: that while a demurrer cuts back to the first bad pleading, it is by no means sure that a motion to strike out will effect the same end; nor is it sure that the decision on such a motion could be considered a final judgment, entitling the party to a writ of error or appeal.

These general propositions are now reduced to form, not because this case requires the statement of them, but that it may be understood that the rulings of Mr. Justice Miller, and Judges Dillon and Treat, heretofore made on the points stated, are to be adhered to.

As to the motion now before the court, it must suffice to say that the question intended to be prescribed would have been more properly raised on demurrer to the answer, instead of a motion to strike out. But, waiving that technical question, we find that the answer as to the special defence is somewhat vague; yet, if true, it makes it appear that the alleged agreement set up in the petition, if made, was fraudulent and void. The defendants ought to have put themselves distinctly on record, by positive averments; yet they have, by liberal construction, done so, and if a demurrer, instead of a motion, had been interposed, the objection made would have cut back to the petition.

The cause of action, as set out, discloses imperfectly a con-

tract on the part of plaintiffs to receive a sum of money beyond what other creditors were to receive for assenting to a *quasi* composition; and such a contract, if the assent of all was required, the law pronounces void.

We regard the answer, liberally construed, as charging in substance that the contract sued on, if made, was one under which the plaintiffs were to receive a secret preference over other creditors of the same debtor, and this, if true, is a perfect defence.

The motion to strike out is overruled. If plaintiff desires a more specific statement of the points of defence he may move therefor, or he may demur to the answer and thus secure a more concise and clear statement. But the present motion for reasons stated cannot prevail.

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**TURNER and another v. HART and another.**

(*District Court, D. Kentucky. March 4, 1880.*)

MORTGAGE—REFORMATION FOR UNCERTAINTY—EVIDENCE.—A court of equity will not reform a mortgage for uncertainty or misdescription, when the evidence fails to identify the land intended to be mortgaged.

On pleadings and proofs in equity.

The bill sets forth that in 1878 defendant Hart was adjudicated a bankrupt, and defendant Ward elected his assignee; that on the twenty-second of February, 1876, Hart executed to Hall and Allen a mortgage of real property, described as follows: "One hundred acres of land on the Ohio river, opposite the Diamond Island, and being a part of the same land conveyed to me by Brooks' heirs, as shown by deed of record in the Henderson county clerk's office, in Book P, page 532"; that on the fourteenth of August, 1877, Allen assigned to Hall, his co-mortgagee, all his interest in the mortgage, and on the eighteenth of March, 1879, Hall assigned the same, as well as his own interest, to the complainants.

The bill further alleges that at the time the mortgage was executed the mortgagor, Hart, owned three parcels of land on

the Ohio river, known as the "Brooks land," the "Fuller tract," and the "Carson land," immediately adjoining each other, and that the Brooks land and the Carson land had been originally parts of one and the same tract, known as the Brooks tract; that these three parcels had been considered and treated by Hart as being a single tract, under the name of the "Brooks land," or the land bought of the Brooks heirs; that prior to the execution of the mortgage the parcel marked on the plat annexed to the bill as the "Brooks land," containing 263 acres, and the Fuller tract, 21 acres, had been levied upon by the creditors of Hart, under an execution, and that the levy was in full force at the time the mortgage was executed; that it was then well known, both to Hart and to Hall and Allen, the mortgagees, that almost, if not the whole, of said two parcels would be required to satisfy such levy, and that subsequently they were in fact sold in satisfaction thereof, and complainants became the owners of the same by assignment from the purchasers.

The bill then sets forth the proper description of the lands owned by Hart at the date of the execution of the mortgage, by metes and bounds; that, allowing for accretions on the river front and inaccuracies in former surveys, there remains after the sale upon execution, subject to this mortgage, about 100 acres. The bill further alleges that, at the time of the execution of the mortgage, the words "lands conveyed to me by Brooks' heirs," were understood and intended by the parties to include and embrace the original Brooks tract, and the mortgage was accepted by Hall and Allen under the belief and impression that the said words did so embrace and include all lands owned by said Hart within the boundary hereinbefore set out, and it was the intention and meaning of the parties thereto to give Hall and Allen a lien upon 100 acres of land within the said boundary, without reference to the subdivisions as shown by the map, and if such mortgage does not give such lien to Hall and Allen, and to the complainants, as their assignees, it is because of a mistake or inadvertence in reducing the same to writing, and it does not correctly embrace and express the intention and understand-

ing of the parties; that if the mortgage is construed to be limited to the Brooks land, complainants will lose almost the whole of their debt against Hart, as such mortgage will cover only about 14 acres.

The bill prays that the words used in the mortgage, "the land conveyed to me by Brooks' heirs," be construed and held to mean all the lands within the aforesaid boundary owned at the time of the execution thereof by Hart, and that the mortgage may be reformed so as to express the true intention and meaning of the parties and for foreclosure.

Defendant Ward answers, admitting the bankruptcy, the execution of the mortgage, the levy of the execution and the sale, and the subsequent purchase by complainant; alleges that it was not the intention of the parties to convey the entire interest of Hart in the three parcels; that it was known that said execution amounted to less than \$2,000, and that the two tracts covered by the levy were worth \$5,000, and that they were sold at less than one-third of their appraised value. He denies that there is now only about 100 acres of unsold land in the three tracts, but avers that the same amounts to at least 160 acres. He avers that the mortgage was only intended to cover 100 acres of the 263 acres described upon the map as the "Brooks land;" and that, at the time, this land was considered and was in fact ample security for the mortgage, as well as the levy; denies any mistake in the execution of the mortgage, and says it is actually as it was intended at the time to make it, and that the change suggested in the bill was only an afterthought; and further submits that complainants' mortgage is wholly void because of its indefiniteness; that it does not sufficiently describe any land, or identify any part of the Brooks tract.

*D. W. Armstrong*, for complainants.

*Walter Evans*, for defendants.

Brown, J. It seems that the original Brooks tract, upon the Ohio river, consisted of a parcel described upon the map as the "Brooks land," 263 acres; the second parcel, known as the "Fuller tract," 21 acres; and of a third tract, known



as the "Carson Land," of 50 acres; that these, before the execution of the mortgage, all came into the possession of the bankrupt Hart, but by two different deeds. The description of the mortgage to Hall and Allen is exceedingly indefinite upon its face: "100 acres of land upon the Ohio river, opposite the Diamond Island, and being part of the same land conveyed to me by Brooks' heirs, as shown by deed recorded in Henderson county clerk's office, Book P, p. 532." The only thing rendered certain by this description is, that it was intended to be 100 acres out of 263 acres conveyed by the Brooks heirs, by the deed specified in the description, but *which* 100 acres of the 263 the deed fails to specify. If the bill sought merely to identify 100 acres out of the 263 in the Brooks' tract, I think it might be sustained by parol evidence of the precise portion of this tract intended to be conveyed. But, as I understand, the bill seeks to include another tract of land obviously excluded by the description in the mortgage, and not even then to identify in any other way the particular 100 acres intended to be conveyed, but generally to sweep up in favor of the complainants everything that they have not already acquired by their purchase from the bidder under the execution.

I see no reason to doubt that this case stands substantially as it would have stood if the bill had been filed by Hall and Allen, the mortgagees, against Hart, the mortgagor. Complainants are the assignees of Hall and Allen, and are vested with their rights under the mortgage, which was duly acknowledged and recorded. Defendant Ward is the assignee in bankruptcy of Hart, and takes his interest in the land subject to all equities. Indeed, except in cases of fraud, where he represents the creditors as well as the bankrupt, his title is that of the bankrupt himself, nor have I any doubt that where a mistake has been made in the description of the land in a deed, that such deed may be reformed, as between the original parties, if the mistake can be shown by clear and convincing testimony. Thus, if A. conveys to B., a lot of land to which he had no title, B. may show that it was understood that another lot was intended to be conveyed, to which he had

a title, but to authorize such a reformation it should be shown that the parties had distinctly in their minds what was intended to be conveyed. For instance, if the deed be 100 acres out of a 500 acre tract, evidence might be introduced to show which 100 acres was to be included; but if, at the time the deed was executed, no particular portion of the tract was intended to be conveyed, I do not see how it is possible, by parol evidence, to sustain the deed, unless it be considered that the parties were to be tenants in common—the grantor of four-fifths and the grantee of one-fifth. The evidence in this case not only seeks to go outside of the Brooks land of 263 acres, but to include other lands formerly belonging to the Brooks heirs. It, therefore, not only contradicts the deed, but fails to locate or describe definitely the land intended to be conveyed.

Mr. Allen, one of the mortgagees, testified that he thought when the mortgage was executed that it covered a part of the Brooks tract reputed to belong to J. B. Hart, in the Diamond Island Bend: "I understood that the land was one tract, and, I thought, conveyed to Hart as one tract, known as the Brooks tract, and conveyed by the Brooks heirs. I intended, and I thought Mr. Hart intended, that the mortgage should be on 100 acres of the entire land owned by Hart, and I so believed. I did not know that Hart held his land in Henderson county under more than one deed. I can't say that I ever saw any title papers conveying this land to Hart, and I believe my information is altogether hearsay. I have for years past heard him claim land in the Diamond Island Bend, and my recollection is that it was about 300 acres, and it was called 'the Brooks tract.' And I have no recollection of hearing it called by any other name."

Mr. Hart, the mortgagor, says: "I owned three tracts of land, containing, according to my deeds, 434½ acres, less 100 acres sold off. The three tracts originally belonged to one Brooks, who had conveyed by title bond the 50 acre tract to one Carson. I bought two tracts from the Brooks heirs and the other tract from Carson's heirs, and I held and considered the three tracts as one tract, under the name of the

'Brooks land.' I intended to mortgage the balance of the Brooks land, as stated above, not included in the levy of the sheriff, for the debt owing to the Farmers' Bank. I considered that the entire possession was to be understood as the land conveyed to me by the Brooks heirs, and called it all the Brooks land. I knew, at the time the mortgage was given, that the land had been conveyed to me by different parties and different deeds, but don't know what the mortgagees knew about it. Mr. H. F. Turner was my attorney, and I think understood the title to the land, as he platted the whole tract from a survey made in 1862, I think. He may have been Allen's or Hall's attorney; I don't know it. He did not prepare the mortgage."

*Question.* "Did you tell Turner, in any of these conversations, that a part of your land had been conveyed by other parties than the Brooks; did he know that a part of it had been conveyed by Carson?" *Answer.* "Yes, sir; he knew that a part of the land was conveyed by the Carson heirs, before he purchased. I think I explained to him all the facts in relation to the land; the title, the mortgages as they are now understood. I know I talked with his father about the mortgage, and the sale to the bank. I think Turner understood it. I think I told him, before Turner bought the mortgage, that it was intended to cover 100 acres of the entire land I owned on the Ohio river."

*Q.* "After the sale to the bank of said land, and the deed made on the twenty-first of September, 1877, by the sheriff to the bank, of said land, did you claim the said land or hold it adverse to said bank?" *A.* "Only so far as the land exceeded the amount; the number of acres levied upon by the sheriff, and sold by him."

Marshal, one of the complainants, testifies: When we bought the land, I thought there was only one tract known as the Brooks tract, but there was 100 acres more in the tract than we bought, and one Hall had a mortgage on the same. We were advised by Turner to see Hall and purchase his mortgage, in order to get the entire tract, and we did see Hall, and purchased the mortgage from him. The part of

the tract known as the Carson tract has about 15 acres cleared, the rest in wild woods; no improvement on it."

Now this testimony not only does not show that any particular 100 acres was intended to be conveyed, but it seeks to include lands obviously not included in the mortgage, and in direct conflict with the description contained in it. Nor does the evidence now enable us to describe the lands by metes and bounds, or otherwise to identify it, and it would be impossible to render a decree for the reformation of the mortgage by identifying the lands.

It is true, the witnesses declare that it was intended to convey all that was left of the original Brooks tract not covered by the sheriff's deed, but that deed is not produced, nor is any attempt made to identify the land covered by the sheriff's levy and sale, so that if we should decree that complainants were entitled to all the tract except that covered by the sheriff's deed, we should still be unable to identify or separate the land covered by the mortgage. Obviously, the sheriff did not intend to sell an undivided part of the entire estate. He did intend to sell something that could be identified and could be included by metes and bounds; but *what*, the record does not show us, and hence it would be utterly impossible in this case to identify the land intended to be covered by the mortgage.

It seems that the parties had very little idea what they were about when this mortgage was executed, and the court is in no condition to solve that doubt. If the mortgage is to be reformed for uncertainty or misdescription, the evidence ought at least to be such as to enable us to identify and separate the land intended to be conveyed. The testimony in this case wholly fails to do this, and for this reason, if for no other, the bill must be dismissed.

## SELIGMAN and others v. WELLS and another.

(Circuit Court, S. D. New York. January 20, 1880.)

**DRAFT—SPECIFIC SUM PAID DRAWEE—TRANSFER TO TRUSTEE OF BANKRUPT DRAWER.** The holder of a draft is entitled to recover a specific sum of money paid to the drawee for the express purpose of taking up such draft, and transferred, after payment had been duly demanded, to the trustees of the bankrupt drawer.

WHEELER, J. Kaufman & Co., bankers at New York, drew three drafts of 25,000 francs each, a few days apart, on the Basler Bank Verein, at Basle, Switzerland, where they had no funds, at sixty days each, payable to their own order, and negotiated them severally to the orators, who presented them for acceptance. After the first two had been so presented, and before the bank knew of the third, the bank, through its agents, Alfred Merian & Co., bankers at New York, called upon Kaufman & Co. to provide funds to meet the two drafts, whereupon they delivered to Merian & Co. \$14,500 in gold, to meet the three drafts, which Merian & Co. received for that purpose and transmitted to the Basler Bank Verein. The bank then accepted the two drafts and paid them, which, with charges, amounted to \$10,139.81, leaving \$4,360.19 towards the other, but not sufficient to pay it, and refused to accept or pay the other. Kaufman & Co. were adjudged bankrupts, and the orator, Joseph Seligman, and the defendants, became trustees of their estate in bankruptcy, and, on the demand of the defendants, the bank transmitted and delivered to them the sum of \$4,360.19, gold, against the claim of the orators. This bill is brought to recover that sum.

That a check drawn against a fund does not, of itself, operate as an assignment of the fund, or any part of it, so as to vest any right to it in the holder of the check before acceptance, either at law or in equity, is well enough settled, both on principle and by authority. *Bank of Republic v. Millar*, 10 Wall. 152; *Rosenthal v. Mastin Bank*, per Blatchford, C. J., S. D. N. Y. November 25, 1879. Here the checks were not drawn against any funds in the hands of the drawees, but the

money was placed in the hands of the drawees expressly to provide for the checks. They were not legally bound to receive the funds for that purpose, or to accept or pay the drafts unless they chose to do so. *Williams v. Everett*, 14 East, 582. They did not, however, refuse to receive the funds for that purpose, as the defendants in *Williams v. Everett* did, but received them with full knowledge of the purpose, and without objection or protest. This sum was set apart and appropriated by the bankrupts, before bankruptcy, for the holders of the checks, and was in the hands of the Basler Bank Varein for that purpose, and was claimed by the holders of the check while it was there for that purpose, and while they had the right to it, and before bankruptcy proceedings were commenced.

This case is like *De Bernales v. Fuller*, 14 East. 590, note c, where it was ruled, at the trial before Lord Ellenborough, C. J., that money paid into the defendants to take up a particular bill could not be recovered by the holder for want of privity; but afterwards a rule for a new trial was made absolute, after much discussion by the court, because it appeared that the money was paid into the defendants' house for the specific purpose declared at the time of taking up that bill, which purpose was not directly repudiated till afterwards, and the plaintiff finally recovered. *De Bernales v. Fuller*, 2 Camp. 426.

That case is not contrary to *Williams v. Everett*, or *Bank of Republic v. Millard*, or cases elsewhere holding that drawing and delivering a check is no assignment of the fund. And, on principle, it would seem that when Kaufman & Co. directed the Basler Bank Varein to pay money to the orators, which would include a direction to the orators to receive it, and had been paid by the orators for the right to receive it, and then sent the money to be paid, and it was received for the purpose of making the payment, the orators would have a right to the money on calling for it while it was there.

As the orators are entitled to the money in the hands of the bank they have the right to follow it into the hands of

the defendants, who, in receiving it, acquired no greater right than the bank had.

It is ordered that a decree be entered for the payment by the defendants to the orators of the sum of \$4,360.19, gold, received by the defendants from the Basler Bank Varein, with costs.

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PAGE, Adm'r, and another, *v.* THE HOLMES BURGLAR ALARM TELEGRAPH COMPANY.

(Circuit Court, S. D. New York. February 17, 1880.)

PATENT—EMPLOYE IN PATENT OFFICE—INVENTION PRIOR AND PATENT SUBSEQUENT TO EMPLOYMENT—ACT OF JULY 4, 1836.—The second section of the act of July 4, 1836, (5 U. S. Stat. at Large, § 113,) disqualifying an employe in the patent office from acquiring an interest in a patent, does not disqualify such employe from obtaining a patent, after such employment has ceased, for an invention made prior to the commencement of such employment.

SAME—ABANDONMENT—PROPERTY OF GENERAL PUBLIC IN THE INVENTION—PATENT SUBSEQUENTLY ALLOWED BY ACT OF CONGRESS.—The consent of the inventor to the public use of his invention, or the withdrawal of his application for a patent, does not vest any right of property in the general public, in the sense of the fifth amendment to the constitution of the United States, so as to prevent the subsequent allowance of a patent for such invention, by act of congress, unless there was, in a particular case, a reduction of the invention to use and practice, by its embodiment in some apparatus prior to the issue of such patent.

**Infringement of patent.**

BLATCHFORD, J. This suit is founded on reissued letters patent granted October 10, 1871, to Priscilla W. Page, administratrix, etc., of Charles G. Page, deceased, and the Western Union Telegraph Company, for improvements in induction coil apparatus and circuit-breakers, the original patent having been granted to said Page April 14, 1868. It was granted under an act of congress approved March 19, 1868, (15 U. S. Stat. at Large, 356,) which provides as follows: "The commissioner of patents is hereby authorized to receive and entertain a renewal of the application of Charles Grafton Page, for letters patent for his induction apparatus and cir-

circuit-breakers, now on file in the United States patent office, including therewith his circuit-breakers described by him prior to said application, and that if the commissioner shall adjudge the said Page to have been the first inventor thereof, he shall issue to him a patent, which patent shall be valid, notwithstanding said Page's invention may have been described or in use prior to said application, and notwithstanding the fact that said Page is now an examiner in the United States patent office: *Provided*, that any person in possession of said apparatus prior to the date of said patent shall possess the right to use, and vend to others to use, the said specific apparatus in his possession, without liability to the inventor, patentee, or any other person interested in said invention or patent, therefor."

There are 15 claims in the reissue. It is insisted that claims 11, 12 and 13 have been infringed by the defendant. They are as follows: "11. The adjustment of the retractile force of an automatic circuit-breaker, substantially as set forth. 12. The combination of an electro-magnet, armature and adjustable retractor. 13. Adjusting or regulating the length of vibration of the armature of an electro-magnet by means of a set-screw, or any mechanical equivalent for substantially the same purpose, substantially as herein set forth."

Portions only of the specification are necessary to be considered. After describing the arrangement of a revolving armature for an automatic circuit-breaker, the specification says:

"Instead of a revolving armature for a circuit-breaker, a vibrating armature may be substituted, and the latter will be found more convenient for several reasons. One especially is, that it can be readily adjusted so as to increase or diminish the rate of interruption of the circuit and the force to be overcome in working it. A vibrating automatic circuit-breaker, consisting of a very small electro-magnetic bar, vibrating between the arms of a permanent magnet, the magnet changing its poles at each vibration, the length of vibration



of the bar being regulated by a set-screw, makes a good circuit-breaker, and will be found fully described by the said Charles G. Page in Silliman's Journal, volume 32, pages 356 to 358, in a communication dated April 19, 1837. This species is, however, not so simple as others, and further allusion to it is not necessary. A vibrating armature is preferable, as it requires no change of poles to effect its motion, this being produced by merely intercepting the galvanic current at suitable intervals. One form of vibrating armature is shown at fig. 8. A small rod of soft iron, about the size of that shown in the figure, is mounted upon an axis or shaft, *s*, which is supported in suitable bearings upon two pillars, *r*, so as to vibrate freely. A small electro-magnet is supported upon one of these pillars, and the armature is placed between its branches, so that one end is above and the other below the plane of the magnet. One end of the armature bears a branching copper wire, its branches passing down into mercury cups *c*, *c'*. Cup *c* may be partly of glass, so that the play of the end of the branch wire in and out of the mercury in the cup may be seen, and the spark produced on breaking the circuit rendered visible. When the magnet is charged the armature is attracted towards its poles, and around the ends of the armature is a ferrule of thin brass or non-magnetic metal, to prevent magnetic adhesion of the armature to the magnet. The galvanic connections are under the base board and may be traced as follows: One pole of the battery being connected with cup *p*, and the other with cup *n*, the current will pass along from cup *p* to cup *c*, as indicated by the arrow, thence upward through one branch of the wire and downward through the other branch into cup *c'*, thence upward again into one end of the wire around the electro-magnet, and, circulating around the wire coil, will pass out through the other end to cup *n*, and so back to the battery. The passage of the current charges the magnet, lifts one end of the armature, raises the branch wire from the mercury in the cups *c*, *c'*, and breaks the circuit. This end then falls by its weight, the branch wire overbalancing the other end, the circuit is again completed, and thus it may be

broken with great rapidity. An adjusting or set-screw may be placed on a suitable support over this end, after the manner of the last named vibrating circuit-breaker, so as to regulate the extent of the vibrations. The weight of this end, or what may be denominated its retractile force, may also be regulated by a small movable weight placed on or over this half of the armature, after the manner shown in figure 10. This circuit-breaker is introduced into the circuit of the primary coil in the same way as the revolving armature. A more simple form of vibrating armature is shown in figure 9, in which the armature  $n$  vibrates to and from the electro-magnet  $u u$ , in a direction parallel to itself. It is attached to a light brass spring  $s$ , fastened to pillar 2. This spring passes through an opening in the yoke  $y$  on the top of pillar 3. At  $p$  is a tip or small disk of platinum, soldered to the spring, which is in contact with the platinum point on the lower end of the set-screw  $s'$ , passing down through the top of the yoke. Set-screw  $s'$  is accompanied with a tightening nut  $s''$ . This set-screw regulates the proximity of the armature to the magnet, and, to some extent, the tension of the spring and the rapidity of its vibrations. It will be seen, however, that the regulation or adjustment is imperfect, for, as the spring is pressed down towards the magnet, the armature is brought nearer to the magnet, and, as the attractive force increases more rapidly with the diminution of the distance between the armature and the magnet than does the force of the spring increase, the adjustment is, in a measure, defective. If, now, the magnet  $d d$  be connected with the battery and charged, and the circuit with the battery is made by the current passing up pillar 2, thence into spring  $s$ , thence into set-screw  $s'$  and pillar 3, and thence through the wires of the electro-magnet back to the battery, the magnet will draw down the armature, and with it spring  $s$ , and thus break the circuit, by pulling the platinum disk away from the platinum point on the lower end of set-screw  $s'$ . On breaking the circuit the magnet loses its power, and the spring rises and completes the circuit again, the magnet is again charged and the armature drawn down and breaks the circuit again,

and thus a very rapid series of vibrations and interruptions of the circuit may be effected. It is evident, therefore, if the circuit of this breaker is included in or forms part of the main circuit which passes through the primary coil, that at each break an induced current will be set up in the secondary coil, as with the other circuit-breakers. In figure 10 is shown an electro-magnet and armature in which the retractile force of the armature is made adjustable. This is oftentimes important. The coils *i* are secured to a base board and enclose a bundle of soft iron wires, seen projecting slightly at *a*. Between the two pillars *x* is suspended the vibrating electro-tome or circuit-breaker. *g* is a small cylinder of soft iron attached to one end of the lever *e*, which passes through or is otherwise secured to the vibrating shaft *k*. The other end of the lever dips into a mercury cup *m*, fixed upon the metallic strap *b'*. On the strap *b* is another mercury cup of brass, into which descends a branch wire *h*, from the vibrating wire *e*. Arising from the shaft *k* is a stiff brass wire, in the form of a bent lever, carrying upon its horizontal portion *o* a ball *f*, which is movable on a screw thread from end to end of portion *o*. It will be seen that, as the ball is moved towards the extremity *o*, it increases the weight of the long arm of wire *e*. If the coils and magnet be charged by the current from the battery, and the current passes from the strap *b* to *b'*, through the lever *e* and mercury cups, the magnet *a* will attract the hammer piece *g*, and, in so doing, will lift the end of lever *e* out of the mercury in cup *m* and break the circuit, when the armature-lever, being drawn back by the retractile force of the weight, will again close the circuit. As the weight *f* is further removed from the center of vibration, the more magnetic power will be required to move the hammer *g*; its distance from magnet *a* remaining the same the greater is its retractile force, and the more suddenly and completely will the circuit be broken in cup *m*. The distance between *g* and *a* can be varied by slightly bending the wire *e*."

The text of the specification of the original patent is, in the foregoing parts, substantially identical with that of the

specification of the reissue, and the drawings of the two are identical. Among the claims of the original patent were the following: "Eleventh, I claim the adjustment of the retractile force of an automatic circuit-breaker, substantially as set forth. Twelfth, in combination with such adjustment, I claim adjusting the distance of the hammer, or the armature, from the pole or poles, of the electro-magnet which actuates them, as set forth. Thirteenth, I claim adjusting or regulating the length of vibration of the circuit-breaking bar, by means of a set-screw, or any mechanical equivalent for substantially the same purpose, substantially as herein set forth."

Dr. Page was appointed principal examiner in the United States patent office in 1842. It is claimed that, before that time, and in 1836, 1837, and 1838, he had made some or all of the inventions covered by the patent sued on in this case. Being prevented by statute from obtaining a patent while such examiner, he applied to congress in 1845 to remove such disability. Not obtaining such relief, he resigned his office of examiner in 1852. On the second day of February, 1854, he applied for a patent for what he called "a new and useful machine for administering electricity as a remedial agent." The specification was sworn to February 2, 1854. Part of the contents of the file wrapper in that case is an affidavit made by Dr. Page January 27, 1854, in which he states "that, sometime prior to his appointment as an examiner of patents in the United States patent office, he made an invention entitled by him the compound magnet and electrotome, the same consisting chiefly in combining a self-acting electrotome with a compound magnet and helix, and that, sometime after said appointment, upon discovering that said invention was being extensively made and sold, he applied to congress for authority, by special act, to take out a patent for said invention, by and with the advice and written recommendation of Hon. H. L. Ellsworth, then commissioner of patents, and that said application was refused by congress; that, as soon as he was able, he resigned his office, and took the necessary steps to secure his rights to said invention, and

that said invention is now in public and common use, and extensively made and sold, and that he has never consented to such sale or use, nor abandoned such invention to the public."

Accompanying said application was a letter from Dr. Page to the commissioner of patents, dated January 27, 1854, in which he said: "Being about to apply for letters patent for the invention set forth in the accompanying affidavit, I beg leave to request that you will authorize the examination of my claims without delay, in view of the facts in the case, but more especially for the reasons that the invention has been so long in public use without my consent or power to restrain it, and that I have hitherto made application for letters patent for this invention to congress, the only source from which, under the law, I could expect to get a patent."

The drawings accompanying said application do not seem to have been preserved on file, though the record shows that there were two drawings. The specification on the application, as originally filed, said: "Fig. 1 is a perspective view of the machine. Fig. 2 is a bottom view of the base board of the machine, showing the wire connections. Figs. 3, 4, 5, 6, are views of various forms of compound electro-magnets. Figs. 7, 8, exhibit different forms of interrupters or electro-tomes. My invention consists, first, in combining with a helix or helices, enclosing a compound and adjustable electro-magnetic core, a self-acting electro-magnetic electrotome, so that, when said helix or helices are connected with a galvanic battery, the galvanic circuit shall be instantly broken and re-established, and thus continuously and rapidly interrupted and completed, without the aid of the operator, or mechanical movements, whereby a rapid succession of shocks may be obtained and graduated in a convenient manner for medical purposes. Prior to my invention mechanical interrupters or electrotomes were employed to produce shocks from helices, enclosing electro-magnets, and required the services of an attendant, and the size, expense and difficulty of working such machines prevented their use to any considerable extent; but the employment of the self-acting electrotome in

combination with the compound electro-magnet reduced the size and expense of the machine, rendered it more simple and efficient, dispensed with the attendant, and thus brought it within the reach of almost every afflicted person requiring the remedial aid of electricity. The helix consists usually of two sizes of wire, the layers nearest the magnetic core being of large wire, say No. 16, and those exterior to them of fine wire, say No. 20 and upwards. The large wire is to be connected with a galvanic battery to induce magnetism in the core, and the shocks are obtained by contact with the ends of the fine wire. The helix *a*, thus formed, is secured to a base board by brass straps, *b, b*, and the extremities of the fine and large wires are let down through suitable holes in the base board, for the purpose of making all the necessary connections underneath the board, out of sight, and give a neat appearance to the instrument. The connections through which the galvanic circuit is completed, and the mode of breaking the circuit, are as follows: The positive pole of the battery is to be connected, we will suppose, with a binding screw cup 1. At wire P, soldered to the lower part of this cup, passes under the base board to the point *p*<sup>2</sup>, where it rises through the board to connect with one extremity of the large wire of the helix, the other extremity coming down through the board to connect with wire *p*<sup>1</sup>. The wire *p*<sup>1</sup> is soldered to the lower part of the pillar 2, and upon the top of this pillar is secured a metallic spring, *s*, which is in contact with a metallic point upon the lower end of set-screw *s*<sup>2</sup>, and by this means in contact with pillar 3, from the lower end of which there passes a short wire, *p*<sup>3</sup>, to the extremity, 4, of the wire *d, d*, surrounding the little electro-magnet *c*. The other extremity, 5, descending through the board, is connected by a short wire, *p*<sup>4</sup>, with the lower end of binding screw cup 6. The metallic circuit for the battery is thus completed, and the magnet *c* draws down the armature *n* attached to the end of spring *s*, and, breaking the contact between spring *s* and the point of the set-screw *s*<sup>2</sup>, interrupts the galvanic circuit and produces the shock. The force of the spring *s* renews the contact with the set-screw, and the magnet *c* again acts,

and thus we have a series of shocks produced with a rapidity dependent upon the strength of magnet *e*, and the adjustment of spring *s* by the set-screw *s'*. The fine wire helix has its extremities connected with cups *x, x*, by wires *p'*, *p'*. The shocks are obtained by immediate contact of the fingers with the cups *x, x*, or by other well-known modes of communicating shocks. The figs. 3, 4, 5 and 6 represent different forms of compound magnets. The term, compound magnet, was originally applied to a bundle of iron plates, as in fig. 3, or a bundle of wire, as in fig. 4, but, as the scroll of thin plate iron, fig. 5, and an iron bar divided down to its center, as in fig. 6, act in a similar manner to the bundle of wires or plates, they are termed, also, compound magnets, though they are not so efficient as the two first named. The lower end or tip of the set-screw is armed with platinum, and the surface of the spring *s*, immediately under the set-screw, is covered with platinum in order to preserve a clean surface when the current is broken. The bundle, *m*, of iron or steel wires is generally inserted loosely in the helix for the purpose of graduating the shocks, the strength of the shocks depending upon the degree of insertion of the bundle of wires. Figs. 7 and 8 represent two varieties of electrotome, either of which may be substituted in place of the electrotome or interrupter shown in fig. 1. The drawings, without any special description, will suffice to explain these interrupters to persons skilled in the subject, and full descriptions of both have been hitherto published by me in *Silliman's Journal*, vol. 35, pages 262 and 267."

The claim was in these words: "What I claim as my invention is, combining with a helix or helices, inclosing a compound electro-magnet, a self-acting interrupter or electrotome, substantially in the manner herein set forth."

The patent office, on the fifteenth of February, 1854, addressed Dr. Page as follows: "In the matter of your application for letters patent for an alleged improvement in magneto-electric machines, it is found you have been anticipated in the device of combining with a helix or helices, inclosing a compound electro-magnet, a self-acting inter-

rupter, in the publication of the same thing by Golding Bird, in the *London, Edinburgh and Dublin Philosophical Magazine* for January, 1838." Dr. Page replied thus, on the seventeenth of February, 1854: "I have examined the publication of Golding Bird, upon which you have rejected my claim, and, if you will take pains to read the whole of his article, you will find that he gives me credit, in so many words, as the first inventor. I therefore ask for a reconsideration of the case."

He also, on the same date, addressed the patent office thus: "As my invention for the medical application of electricity has been for some years in public use, if the office, in view of the affidavit which I have recently filed, should consider the question of abandonment, I beg leave, further, to state that I have from the first had in contemplation the making of this application as soon as practicable, and that I used all reasonable diligence in seeking protection of my rights in relation thereto. I made application for a special patent for this invention to the only tribunal to which I was allowed to go as soon as I discovered that it was going into public use, and that application, it would seem, might be regarded as still pending and entitling me to privileges of protection as well as those who, under the law, make application to the patent office. I ask of the patent office as much indulgence as the law gives to inventors and patentees within the pale of the law. An inventor is not debarred his patent by reason of public use for any number of years after his application and before his patent, nor are his acts of consent and allowance called in question, if his application lie untouched by him for years. Nor is public use and sale for any number of years within the term of a patent held to be a bar to the recovery of that which was inadvertently not claimed; though its publication, unclaimed in a patent, seems to me to approach very near a formal dedication of it to the public. The statute of limitations applies neither to the applicant nor the patentee in this particular; and, as my case is novel, peculiar, and without precedent, I trust the office will leave this question to be decided by the courts, and



grant my patent, provided no other objection should be found."

The office replied thus, on February 23, 1854: "Yours of the seventeenth instant, relating to the matter of your machine for administrating medical electricity, has been received, together with an amended claim. The publication made by you of the subject of this claim in *Silliman's Journal*, in 1837, anticipates the publication made by Bird, as referred to in the official communication of the fifteenth instant. The only remaining difficulty in the way of the grant of a patent to you, therefore, so far as the office is informed, is the fact that the machine has been for a long course of years in public use. By the seventh section of the act of 1836 it is made the duty of the commissioner of patents to take cognizance of the case where the invention has been in public use or on sale with the applicant's consent and allowance, this being placed on the same footing as the other conditions for refusing a patent. The only modification of this part of the section is that by which a period of two years is allowed for the previous sale or use, as provided in the seventh section of the act of 1839. In the present case, that period has been exceeded many years. The only remaining question, therefore, is whether the sale and use have been with the applicant's consent and allowance. In the affidavit made by you on the twenty-seventh of January, 1854, it is testified that you have never consented to such sale or use, nor abandoned said invention to the public. It is not, however, necessary that the consent should be actually expressed. It may be inferred from the acts of the applicant; and it will be inferred when nothing appears to show that he has properly warned the public, or the parties selling and using, against the sale and use, or that he has taken timely measures to secure a patent for his invention. All that has been adduced to show this in the present case is the allegation that the applicant, from the time he found the invention going into general use, was laboring under a legal disability to procure a patent therefor under the law, in consequence of his official connection with the patent office, and that he applied to congress for a special patent for

this invention. But it does not appear that the particular invention now in question was described in the application to congress, or indicated by any title sufficient to identify it. That application, therefore, cannot be taken as a notification to the public of your intention to reserve to yourself the right to this invention. Neither could it be considered equivalent to an application filed according to law in the patent office, where a description of the thing is required. It can only be entertained as showing what effort was made to remove the disability which would prevent you from obtaining a patent while holding the office of examiner of patents. If it was proved that the effort thus made had reference to the procuring the patent now applied for, it is allowed it would be worthy of much consideration; and, as it is, the refusal of congress to grant the petition that was made, may be regarded as enforcing the fact of disability. But, then, in either case, the disability must be considered as self-imposed, inasmuch as the applicant had it in his power at any time to remove it, by resigning his office. The fact that he retained his office for many years, and declined to take the only course open to him for obtaining a patent, while his invention was going into extensive public use, without any public reclamation by him, must be considered proof of consent and allowance. This inference, that the public sale and use were with the applicant's consent and allowance is, also, much strengthened by the fact that nearly five years elapsed, after the first publication in *Silliman's Journal*, before the legal disability commenced, without any steps being taken to secure a patent, and by the further fact that, after the disability ended, and notwithstanding the great length of time the invention had been before the public, nearly 20 months more were allowed to pass before the filing his application, making, in all, a period of nearly 17 years from the time of the first announcement of the invention to the public. For these reasons the patent is refused."

On the twenty-eighth of July, 1854, Dr. Page addressed the office as follows: "*To the Commissioner of Patents*—Sir: I hereby withdraw my application for a patent for machine for administering electricity as a remedial agent, now in your

office, and request that \$20 may be refunded to me, agreeably to an act of congress in such cases made and provided."

On the same day the \$20 was returned to Dr. Page in person. Subsequently, Dr. Page presented to congress a petition dated January 16, 1866, in which he said: "During the years 1836, 1837 and 1838, your petitioner invented a magneto-electric apparatus for administering electricity as a remedy for diseases, and, also, for purposes of scientific illustration, since known under the various names of Page's compound magnet and electrotome, Page's induction coil, Page's separable helices, and Page's analysis of shocks, a distinguishing feature of which invention was an automatic or self-operating circuit-breaker, by which the presence of an attendant or assistant was dispensed with. Said apparatus also embraced other novel and original features of improvement. In the year 1842 your petitioner was appointed principal examiner in the United States patent office. Some time after said appointment, your petitioner discovered that his said invention was being introduced into public use by others without his consent, and being disabled, under the law, from obtaining a patent, your petitioner, at the recommendation of Hon. Henry L. Ellsworth, then commissioner of patents, in the year 1854 applied to congress to remove the disability in his case, inasmuch as the invention was made before his said appointment to office. Failing in this to obtain relief, your petitioner, as soon as his circumstances permitted, did, in the year 1852, resign his office, and, as soon thereafter as practicable, February 2, 1854, applied for a patent for this, his said invention. After a very thorough investigation, the commissioner of patents decided that the invention was novel and original with your petitioner, but refused to grant a patent, on the ground of abandonment of the invention to the public. Your petitioner is unwilling to admit that the public use of said invention was with such entire consent and allowance on his part as in equity, to have worked an abandonment against him, as the circumstances were peculiar and extraordinary, and such as have never before occurred to an American inventor, and he, therefore, prays your honorable bodies to

remove the disabilities in his case, and enable him again to apply for, and take out, and hold, a patent for this, his said invention, notwithstanding its previous public use. Your petitioner moreover states, that, by a recent act of the emperor of France, the honor of this, his said invention, has been accredited to M. Ruhmkorff, by an imperial award of 50,000 francs for the same. (See *Silliman's Journal*, vol. 39, No. 115, January, 1865.) Thus deprived of all emolument from this, his invention, and robbed of the honor which justly belongs to him, by this act of a foreign power, your petitioner is prepared to show, by testimony of the highest character, from men of science in this country and in Europe, and by experimental demonstrations before your honorable bodies, that this invention is entirely his own; (see *Silliman's Journal*, vol. 15, 1853, p. 115, foot note by the editors; also, same volume, p. 115, foot note by the editors; also, *London and Edinburgh Philosophical Magazine*, vol. 12, p. 22; also, *Sturgeon's Annals of Electricity and Magnetism*, vol. 1, pp. 293, 294, 1837; also, same volume, p. 500, 1837; also, *Davis' Catalogue*, of 1838; also, *Scientific American*, vol. 12, No. 1, p. 5; vol. 12, No. 5, p. 69; vol. 12, No. 15, p. 230; also, *Silliman's Journal*, vol. 35, p. 252, 1839; also, *Silliman's Journal*, vol. 32, pp. 355-6, 1836; also, *Silliman's Journal*, vol. 31, p. 141, 1836; from all of which publications *verbatim* extracts are hereto annexed;) and he, therefore, prays that your honorable bodies will, as an off-set to this foreign appropriation of his rights, and in justice to an American inventor, empower him to apply for, and take, and hold, a patent for this, his said invention, notwithstanding said imperial award, and the aforesaid previous public use, provided the commissioner of patents shall be satisfied of his right thereto, as the original and first inventor of the same."

Extracts from the publications referred to were annexed to the petition. The act of March 19, 1868, was then passed. Under that act, Dr. Page applied, on March 26, 1868, for the patent which was granted April 14, 1868. The specification was sworn to March 19, 1868. In a letter to the patent office, dated March 25, 1868, accompanying the appli-

cation, Dr. Page said: "In making this application for a patent, according to the recent act of congress authorizing the same, permit me to say that, on the original application, filed February 2, 1854, the claim as first presented was rejected on the fifteenth of February, 1854, upon a publication of Dr. Golding Bird, in the *London, Edinburgh and Dublin Philosophical Magazine*, for January, 1838. It so happened that, in the conclusion of that article, Dr. Bird gave me credit as the first inventor of what he at first supposed was the novelty of his apparatus, viz.: the automatic circuit-breaker. Finding, however, that the precise combination which I claimed was used by him before I used the same, I amended my claim, making it much broader than before, striking out the word *compound* electro-magnet, and substituting the word electro-magnet, and also claimed the automatic circuit-breaker in connection with a helix or helices. This amendment the examiner accepted, and admitted the claim to be good, but rejected the application on the ground of abandonment. I have not, therefore, in this application, reiterated the original claim, but have claimed the helix or helices, and compound electro-magnet, in combination with an automatic circuit-breaker, in which the length of vibration of the circuit-breaking bar is regulated by suitable devices. I have also claimed the combination of the helix or helices, and compound electro-magnet, with a circuit-breaker in which the retractile force of the vibrating or circuit-breaking bar is regulated. Both of these features are original with myself, and their introduction distinguishes these claims from the original. The introduction of these and other claims is in accordance with the provisions of the act of congress."

The defendant is a corporation which manufactures and sells telegraph burglar-alarms, in which a circuit-breaker acts automatically to make and break the circuit, so that, by the movement of an armature to and from an electro-magnet, a bell is rapidly struck by a hammer. The plaintiffs' specification, and figs. 10 and 11 of the drawings, show an arrangement whereby, when the circuit is broken and the magnet ceases to attract the armature, the armature is drawn

back or retracted to make the circuit again, by a weight attached to an arm, and adjustable thereon. Such weight overbalances the weight of the armature, and draws it away from the magnet when the circuit is broken. The adjustment of the weight or retractile force is made by moving the weight on a screw thread cut on the arm. In the defendant's apparatus, the retractile force which acts on the armature, to draw it away from the magnet, is a spiral spring, the tension of which spring is made adjustable, by minute adjustments, which can be made while the apparatus is working and without stopping it. The weight in the plaintiffs' patent has the same extent of adjustable capacity. The defendant's apparatus has the combination of an electro-magnet, an armature, and an adjustable retractor. It also has a set-screw, against which the armature strikes when it is withdrawn from the magnet by the retractile force, such set-screw being adjustable and regulating the length of the vibration of the armature. It is quite clear that the defendant's apparatus infringes the eleventh, twelfth and thirteenth claims of the plaintiffs' patent, and the plaintiffs' expert so testifies.

It is contended, for the defendant, that the eleventh claim is not infringed, because the plaintiffs' weight and the defendant's spring are not mechanical equivalents. In the place in which the two are used, and in view of the service they perform, it is manifest that they are mechanical equivalents. It is also contended, that the object of making the spring adjustable is to ascertain, by using the adjustable functions of the spring, whether the apparatus is in working order originally, and that then the spring is left at the tension fixed upon. But the defendant makes the apparatus adjustable for some purpose, as to the retractile force, and such adjustability is confessedly availed of, in setting the apparatus for use originally. The words, "the adjustment," in the eleventh claim, are to be read as meaning the mechanical means of making the adjustment.

It is not really seriously contended that the twelfth claim is not infringed.

In regard to the thirteenth claim, it is contended that, in

the defendant's apparatus, the set-screw is set originally at a given point, to determine the extent of the vibration of the armature, and is not afterwards changed. But the apparatus is made with a set-screw, which can regulate the length of vibration of the armature, and it is used for that purpose, if used only once. Moreover, the claim is to the set-screw, or its mechanical equivalent, so arranged as to be capable of making such regulation, and is a claim to the mechanical means.

The act of congress of March 19, 1868, authorized a renewal of the application made by Dr. Page, February 2, 1854, to the patent office, for a patent, "including therewith his circuit-breakers described by him prior to said application." Such application shows the combination of a self-acting electrotome; that is, an automatic circuit-breaker, with a compound and adjustable electro-magnetic core and a helix. The expression, "circuit-breakers described by him prior to said application," is to be understood by a reference to the petition to congress on which the act was passed. That petition refers to an apparatus invented by Dr. Page, in 1836, 1837 and 1838, and states that a distinguishing feature of it was an automatic or self-operating circuit-breaker, and that it embraced other novel features. The petition refers to various publications, some of which were descriptions by Dr. Page of circuit-breakers invented by him. Those are the circuit-breakers intended by the act, and the word "circuit-breakers" there includes such appendages or added instrumentalities, so previously described by Dr. Page, as were calculated to make the circuit-breaker more efficient or perfect.

The apparatus which embraces the invention covered by the eleventh claim of the plaintiffs' patent is the one shown by figure 10 of the drawings of the patent. That identical drawing is found on page 258 of volume 35 of *Silliman's Journal*, published January 12, 1839, in an article by Dr. Page, commencing on page 252. There is, in the text, on pages 258 and 259, a description of the manner in which the retractile force of the automatic circuit-breaker is adjusted,

with references to the drawing and to the letters on it, which description is substantially the same as the description in the plaintiff's patent of what is shown by figure 10 of the drawings of the patent. The same description and drawing set forth and show the combination covered by the twelfth claim of the plaintiffs' patent, as it is described in that patent.

Figure 1 of the drawings of the application of February 2, 1854, was, undoubtedly, the same as figure 9 of the drawings of the patent. Such application describes, by references to letters which must have been on such figure 1, the same apparatus, and by substantially the same description, which is described in the patent by references to letters on figure 9 of the drawings of that patent. The thirteenth claim claims the regulation of the length of vibration of the armature of an electro-magnet by a set-screw or its mechanical equivalent for that purpose. The specification of the re-issue says that the set-screw in figure 9 regulates the proximity of the armature to the magnet. It does so. As the set-screw is turned so as to press down further the spring which carries the armature, the armature is brought nearer to the magnet. Thus, its proximity to the magnet is regulated. Such proximity is a different thing from the tension of the spring, and a different thing from the rapidity of the vibrations of the spring. Nothing is claimed in the thirteenth claim as to regulating such tension or such rapidity. It is such tension and such rapidity which are stated in the specification to be regulated only to some extent by the set-screw, so that the regulation of them is imperfect. When the proximity of the armature to the magnet is regulated, its length of vibration is regulated, although the consequence of pressing down the spring and bringing the armature nearer to the magnet is, that the attractive force of the magnet on the armature increases more rapidly, as the distance between them is lessened, than the force of the spring increases, and thus the same relation is not maintained between the tension or force of the spring and the attractive force of the magnet on the armature which the spring carries, as the spring and the



armature are brought down by the set-screw. So, the regulation of the rapidity of vibration of the spring and armature is imperfect. But the length of vibration of the armature, or the distance from the magnet to which the spring can carry the armature, is regulated; and that is all that the claim deals with. The description in the application of February 2, 1854, says that the set-screw adjusts the spring, against which it bears, and that the armature is attached to the end of the spring. Of course, it follows, from the construction, that, if the set-screw is turned so as to carry the spring down, the armature will be brought nearer to the magnet, although the description does not state that conclusion. It does state that the rapidity of the vibration of the armature depends on the strength of the magnet and the adjustment of the spring by the set-screw. On page 356 of an article by Dr. Page, in *Silliman's Journal*, volume 32, published in July, 1837, is a description and drawing of an automatic circuit-breaker, in which there is a metallic wire vibrating between the poles of a horseshoe magnet, with a thumb-screw for regulating the vibrations of the bar, they being made more rapid by bringing down the thumb-screw on the bar. This, of course, regulates the length of vibration of the bar, as well as the rapidity of the vibrations. This apparatus is referred to in the specification of the plaintiffs' re-issue, as described in *Silliman's Journal*, volume 32, pages 355 to 358, and as "consisting of a very small electro-magnetic bar, vibrating between the arms of a permanent magnet, the magnet changing its poles at each vibration, the length of vibration of the bar being regulated by a set-screw," and as being "a vibrating automatic circuit-breaker."

There is no doubt that what is covered by the thirteenth claim, as described in the specification and shown by figure 9, can take date from February 2, 1854, because described in the application of that date. But it cannot take date from the date of the publication in volume 32 of *Silliman's Journal*, pages 355 to 358. The specification of the re-issue draws, on its face, a clear distinction between an electro-magnetic bar vibrating between the arms of a permanent

magnet, which changes its poles at each vibration, and a vibrating armature of soft iron, attracted towards the poles of an electro magnet, when such magnet is charged, no change of poles being necessary to effect the motion of the armature, and its weight causing it to fall away from the magnet when the circuit is broken. The former is the arrangement in volume 32 of *Silliman's Journal*, and the latter is that of figure 8 of the patent drawings.

The specification states that, into the arrangement shown by figure 8, an adjusting or set-screw may be introduced to regulate the extent of the vibrations of the armature, after the manner of the set-screw in the arrangement in volume 32 of *Silliman's Journal*. The same distinction is drawn in the specification, in reference to the vibrating armature shown in figure 9 of the patent drawings, which is an armature vibrating to and from an electro-magnet, and carried at one end of a horizontal spring, the magnet, when charged, drawing the armature down, and the spring carrying it up and away from the magnet, when the circuit is broken. Then, after thus describing the vibrating automatic circuit-breaker, with the electro-magnetic bar, the permanent magnet, and the regulating set-screw, and two forms of vibrating armature, such vibrating armature vibrating to and from an electro-magnet, temporarily charged, and then losing its power of attraction, on the breaking of the circuit, the thirteenth claim limits itself studiously to adjusting or regulating the length of vibration of the armature of an electro-magnet. It discards all claim to adjusting or regulating the length of vibration of the bar in the circuit-breaker, which has a permanent magnet. The specification plainly says that an electro-magnetic bar, vibrating between the arms of a permanent magnet, is not a vibrating armature, because it says that a vibrating armature is preferable to an electro-magnetic bar vibrating between the arms of a permanent magnet, for the reason it assigns that when the permanent magnet is used, with the electro-magnetic bar, such magnet changes its poles at each vibration, while with the electro-magnet and the vibrating armature no such change of poles occurs, the motion of the

vibrating armature being effected by merely intercepting the galvanic current at suitable intervals. It is apparent, therefore, that the patent itself makes the adjusting or regulating the length of vibration of the armature of an electro-magnet by means of a set-screw, as set forth in the specification, a different invention from the adjusting or regulating by a set-screw the length of vibration of an electro-magnetic bar, vibrating between the arms of a permanent magnet. Hence, the date of the description of the latter invention cannot be taken as the date of the description of the former invention. The matter of the thirteenth claim is patentable under the act of March 19, 1868, because it was described in the application of February 2, 1854, and not because it was described by Dr. Page, in connection with a circuit-breaker of his, prior to said application. It is not shown to have been described by him prior to said application.

The novelty of the invention covered by the eleventh claim is attacked. A publication in volume 1, page 534, of "Scientific Memoirs," in 1837, in London, edited by Richard Taylor, in regard to an apparatus of Dr. Schulthess, is adduced; also a publication in volume 6, page 25, of the "Report of the Seventh Meeting of the British Association for the Advancement of Science," in 1838, in London, in regard to an apparatus of the Rev. J. W. MaGauley. The same two publications are adduced against the novelty of the invention covered by the twelfth claim. The defendant has failed to establish by them the defence of want of novelty in the eleventh and twelfth claims. In the Schulthess apparatus there is no adjustment of the retractile force of an automatic circuit-breaker of any practical utility; none by minute increments and decrements, as in the plaintiffs' and the defendant's apparatuses, and the description gives no evidence of any design to regulate the retractile force, so as to accommodate it to varying currents of electricity. The description of the MaGauley apparatus is not so full and explicit as to entitle it to be considered as a description anticipating either the eleventh or twelfth claim. At page 532 of the same book above mentioned, which contains the description of the Schulthess ap-

paratus, is a description of an apparatus of Prof. Botto, which is adduced to affect the novelty of claims 11 and 12. Little need be said about it. The description is too vague and uncertain to entitle it to any weight. The defendant's expert, Mr. Renwick, makes no allusion to it.

The MaGauley description is adduced against the thirteenth claim, but it is not sufficiently explicit.

There is nothing to affect the novelty of the eleventh, twelfth or thirteenth claims in any of the prior publications adduced in evidence.

The Morse model, with its placard, proves nothing of itself, and there is not a particle of legal evidence as to when it was made or by whom.

The answer of Dr. Page to the ninth interrogatory to him in the suit of *French v. Rogers* is of no force. It relates solely to certain adaptations made by Prof. Morse to a long or main circuit, for telegraphing purposes. Such is the purport of all the interrogatories.

It is contended, for the defendant, that the act of March 19, 1868, is unconstitutional and void. One ground urged is that as Dr. Page was, by section 2 of the act of July 4, 1836, (5 U. S. St. at Large, 118,) disqualified, while an employe in the patent office, from acquiring an interest in a patent, he necessarily, as a consideration for becoming such employe dedicated to the public, on becoming such employe, all inventions which he had previously made, and could not afterwards reclaim them. The soundness of this proposition cannot be admitted. The second section of the act of 1836 does not declare that a person taking employment in the patent office shall be held to have forfeited or dedicated to the public thereby any invention before made by him. It simply prevents him from acquiring an interest in a patent while he remains such employe. But, as soon as his employment ceases, he is in the same position, so far as any effect of the mere fact of his having been in such employment is concerned, as if he had never been in such employment.

It is contended that the act of March 19, 1868, declares only that the patent to be granted "shall be valid, notwith-

standing said Page's invention may have been described or in use prior" to his application of February, 1854, and does not declare that it shall be valid, although Dr. Page might have, before said application, abandoned his inventions to the public; and that, if it did so declare, it would be void. It is urged that Dr. Page, by withdrawing his application of February, 1854, abandoned his inventions to the public. A consideration of all the language of the act, taken together, shows that congress intended to say, and said, that Dr. Page should have a patent which should be valid, if he was the first inventor of the inventions in question, notwithstanding all that had taken place in regard to the prior description by Dr. Page of the inventions, and in regard to their use prior to his former application, and in regard to such former application. The fact of the withdrawal of the application was necessarily known, as it was a public record. That application had been rejected solely on the ground of the use by the public of the invention, with his presumed consent. No other form of abandonment was alleged, and none other is now alleged, except the withdrawal of the first application. Congress has a right to secure to an inventor the exclusive right to his invention for a limited time. It has no right to deprive any person of his property without due process of law. In the act in question it is provided that "any person in possession of said apparatus prior to the date of said patent shall possess the right to use and vend to others to use the said specific apparatus in his possession, without liability to the inventor, patentee, or any other person interested in said invention or patent therefor." So far as Dr. Page's right to obtain a patent was affected by his presumed consent to the public use of his inventions, or by his withdrawal of his first application, congress had full power, if he was the first inventor of those inventions, to exercise its sovereign power of waiving any obstacle arising from such consent, or from such withdrawal, by exempting Dr. Page from the operation of the general statutory rule. But neither such consent nor such withdrawal operated to vest in any one a right, as against the patent finally granted to Dr. Page, to use his inventions after the granting of such patent.

except to the extent covered by the proviso in the special act. Neither such consent nor such withdrawal vested in the general public, including the defendant in this suit, any right which amounted to a right of property, in the sense of the fifth amendment to the constitution of the United States, unless there was, in a particular case, a reduction of the inventions to use and practice, by their embodiment in some apparatus, prior to the granting of the patent. Then the apparatus had become property. But the inchoate right to make an apparatus, embodying the inventions, such right being unexercised before the granting of the patent, was not property, in such a sense as to make it possible to hold that to forbid the use, after the granting of the patent, of an apparatus made after the granting of the patent, is to deprive its owner of property which was in existence when the patent was granted. The proviso in the special act fully protects and preserves all that was property when the patent was granted. The defendant does not present any case within the proviso, nor any case except that of a right claimed, which any other one of the general public might equally have claimed at the time the patent was granted.

The application to be made under the special act was subject to the same rules as other applications, and the same right to a re-issue existed as in the case of other patents.

All the considerations urged against the validity of the patent, and the right of the plaintiffs to recover in this suit, have been examined, although some of them may not have been particularly alluded to in the foregoing decision. The result is that there must be the usual decree for the plaintiffs.

THE ATLANTIC GIANT POWDER COMPANY v. THE DITTMAR  
POWDER MANUFACTURING COMPANY and others.

(Circuit Court, S. D. New York. March 13, 1880.)

PATENT—REISSUE No. 5,799—COMBINATION OF NITRO-GLYCERINE WITH INFUSORIAL EARTH OR OTHER ABSORBENT SUBSTANCE.—Question considered whether patentee derived knowledge of the invention from the alleged infringer of the patent.

Former decisions in relation to reissue No. 5,799 followed.

Application for preliminary injunction for alleged infringement of a patent.

*George Gifford and Causten Browne*, for plaintiff.

*Everett P. Wheeler, and Clarence Lexow*, for defendants.

BLATCHFORD, J. This is an application for a preliminary injunction, founded on reissued letters patent No. 5,799, granted to the Giant Powder Company, March 17, 1874, the original patent having been granted to Julius Bandmann, as assignee of Alfred Nobel, the inventor, as No. 78,317, May 26, 1868, being the same reissued patent which was before this court in the case of the same plaintiff against Rand, and in the case of the same plaintiff against Parker, both of them decided May 5, 1879.

The specific samples of powder complained of were sold by the defendant, the Dittmar Powder Manufacturing Company, through the defendant Carl Dittmar, and are two in number, No. 1 and No. 2. Dr. Hayes testifies that, by analysis, 100 parts by weight of No. 1 contain, nitro-glycerine, 67.64 parts; cellulose, (paper stock,) 16.82; saltpetre, (nitrate of soda,) 15.54; that, by analysis, 100 parts by weight of No. 2 contain, nitro-glycerine, 27.86 parts; sawdust and charcoal, in nearly equal proportions, 5.59; saltpetre, (nitrate of soda,) 66.55; that, in his opinion, the solid ingredients found in each of said analyses constitute together an absorbent substance, which is an equivalent of the infusorial earth specifically mentioned in the plaintiff's patent; that the powders so examined by him are each a combination of nitro-glycerine, with such absorbent substance in substantially the same manner as the combination of nitro-glycerine and infusorial earth

specifically mentioned in said patent; that the said solid ingredients have the property of absorbing, and retaining by absorption, nitro-glycerine, and are free from any quality which will cause them to decompose, destroy or injure nitro-glycerine; that the nitro-glycerine is combined with them in such proportions as to be retained without liability to separation, by compression or leakage; that the said solid ingredients are not liable to explode by concussion, as nitro-glycerine is; that the entire combinations constitute, in his opinion, "safety powders," which can undergo the ordinary shocks of transportation and manipulation without explosion; that the nitro-glycerine therein is explosible, in blasting operations, by the means ordinarily employed for exploding nitro-glycerine; that, while the mixture is in the form of a powder, the nitro-glycerine remains, in his opinion, so compact and concentrated as to have its original explosive power; and that the cellulose, or paper stock ("pulp,") and the sawdust, in said mixtures, perform the same function as charcoal, or carbon, both as to the absorption of the nitro-glycerine, and as to combustion by the heat of the explosion of the nitro-glycerine, and they perform it in the same way, and they perform no other function. In the Rand case the defendants' powder contained, nitro-glycerine, 34.71 parts; nitrate of potash, 52.68 parts; sulphur, 5.84 parts; woody fiber, charcoal and resin, in nearly equal proportions, 5.77 parts. In the Parker case the defendants' powder contained, nitrate of soda, 56 parts; charcoal, 14 parts; nitro-glycerine, 30 parts. In the Goodyear case, before Judge Shepley, the defendants' powder contained, nitro-glycerine, 32.60 parts; nitrate of soda, 49.46 parts; charcoal, 9.63 parts; sulphur, 8.31 parts. All of these powders were held to be infringements of the plaintiff's patent. What Dr. Hayes testifies, as above set forth, in regard to the powders in the present case, shows that they must, for the reasons given in the Rand, Parker and Goodyear cases, be held to be infringements of said patent, unless certain matters presented by the defendants in this case shall be sufficient to lead to a different conclusion.

The defendants contend that the only powder they make



or sell is one called "Dualin," made in accordance with a patent granted to the defendant Dittmar January 18, 1870. They urge the following propositions: (1.) That, in view of matters now presented, the plaintiff's reissued patent, in omitting the word "inexplosive," in discarding the concentration feature of the original patent, and in altering and adding other clauses not contained in the original patent, is broader than the original and void. (2.) That, on the evidence now presented, the Dittmar patent is the first valid and subsisting patent for nitro-glycerine safety powder combinations, composed of nitro-glycerine absorbed in some combustible or explosive, as distinguished from inexplosive substance, and that the plaintiff's reissue should be limited strictly to what is contained within the plain reading of the description of the original patent. (3.) That Dittmar was the original and first inventor of the mixture of nitro-glycerine with some porous solid, as distinguished from fluid or liquid substance, in such proportions as to render the resulting compound a powder safe against the usual shocks of transportation and use, and, therefore, the original and first inventor of the compositions claimed in Nobel's original patent and in the plaintiff's reissue; that Nobel fraudulently and surreptitiously purloined his invention, and that the original and the reissue are void. (4.) That the conduct of the plaintiff and its proceedings heretofore, with respect to its litigations and to Dittmar, have not been such as to justify the application for an injunction at this stage of the suit.

The question of the difference between the original and the reissue in respect to the concentration feature, and in the omission from the reissue of the word "inexplosive," found in the original, in reference to the absorbent substance, was considered and passed upon in the decision of this court in the Rand case favorably to the plaintiff, and the latter point was considered and passed upon in the same way by Judge Shepley in the Goodyear case. In the present case it is contended for the defendants that extrinsic evidence, not in the former cases, is introduced, as to the state of the art of manufacturing explosive compounds in 1867 and 1868, and as to

the use of the word "inexplosive" in that art, which has the effect of showing that the word "inexplosive" was used in the original patent, No. 78,317, in its literal and ordinary sense, and not in the special sense of a substance not liable to explode by accidental concussion. Reference is made to Nobel's provisional English specification, filed May 7, 1867, which speaks of mixing nitro-glycerine with "porous, explosive substances, such, for instance, as charcoal and silica," and to his full English specification, filed March 6, 1867, (both of such specifications pertaining to a patent for an invention communicated by Nobel, dated May 7, 1867,) which speaks of causing nitro-glycerine to be "absorbed in porous, explosive substances, such as charcoal, paper, silica, or similar materials, whereby it is converted into a powder which I call dynamite or Nobel's safety powder." Reference is also made to the fact that the specification of No. 78,317 states that "porous charcoal has also a considerable absorbent capacity, but it has the defect of being itself a combustible material." Reference is also made to the specification of a patent granted by the United States to the plaintiff and the Giant Powder Company, No. 141,455, August 5, 1873, applied for June 4, 1873, the specification being signed by Nobel, which says: "I have, in former specifications, on which letters patent have been granted to me, described the use and effect of the mixing of nitro-glycerine with other explosives, such as gunpowder, gun-cotton, etc., and also the mixing of nitro-glycerine with non-explosive substances capable of absorbing the nitro-glycerine, and have described the advantage obtained from such mixtures, in greatly increasing the explosive power of such explosives, and in doing away with the extreme danger of handling nitro-glycerine in a liquid condition, and the facilitating of its use for blasting purposes."

The specification then sets forth and claims an explosive compound made by mixing nitro-glycerine with a pulverized nitrate like nitrate of soda, or its equivalent, and a pulverized carbon or hydro-carbon, like resin, or its equivalent, with or without pulverized sulphur, the compound being one which may be handled with safety, and will, when not under

strong restraint, burn on the application of fire, without explosion, but may be exploded by detonation. From these references it is contended that the word "inexplosive" was used in the original patent, No. 78,317, not in the sense of a substance that would not explode by accidental concussion, but in the sense of a substance absolutely explosive. It is not perceived that the conclusion sought to be drawn from the premises is a sound one, as applied to the real subject-matter of the invention of Nobel, as to be gathered from the description in the patent, No. 78,317. The views of this court on the subject were fully set forth in its decision in the Rand case, being the same views contained in the decision of Judge Shepley in the Goodyear case, quoted with approval in the Rand case, and it is not necessary to restate them. They are not affected by anything now presented, nor by what is contained in the affidavit of Mr. Parker, or the circular of the plaintiff's agents, or the scientific books adduced, as to the technical meaning of the words "explosive" and "inexplosive."

The principal defence in this case is made on the alleged ground that Dittmar invented what is claimed in reissue No. 5,799, and that Nobel obtained the knowledge of it from Dittmar. Letters patent of Great Britain, dated May 7, 1867, and sealed October 15, 1867, were granted to one Newton, for "improvements in explosive compounds and in the means of igniting the same," being a communication from abroad by Alfred Nobel, of Rue St. Sebastien, Paris, in the empire of France." The provisional specification was filed on the seventh of May, 1867. It read thus: "This invention relates to a method of modifying the nature of nitro-glycerine in a manner which renders it much safer for use than heretofore. Nitro-glycerine, if mixed with porous, explosive substances, such, for instance, as charcoal or silica, becomes very much altered in its properties. Thus, for instance, nitro-glycerine alone is not inflammable by a spark, but may be got to explode by submitting it to a very rapid shower of sparks. Nitro-glycerine absorbed in porous substances, on the other hand, easily catches fire from a spark, and burns away slowly and without explosion, except under very close

and resisting confinement, when a violent explosion ensues. Against shocks or blows the above mixture is far less sensitive than nitro-glycerine alone. Owing to the aforesaid properties of the mixture described, its use for blasting metal or very sound rock requires no other firing than an ordinary safety fuse. In shattered rock or coal, on the other hand, it will cause no real explosion at all, the gas will leak out through the crevices and prevent a great accumulation of pressure from the explosive medium, which alone can determine the detonation of nitro-glycerine when absorbed in porous substances, such as, for instance, charcoal or silica. For this reason a special igniter is used to explode the above mixture in fissured or shaky rocks, or wherever it is to be used without close confinement. That special igniter consists of a kind of percussion-cap, wherein the fulminate is caused to develop a very high gaseous pressure before it bursts, which may be attained either by increasing the charge of fulminate or diminishing the leakage of gas before the cap bursts. This cap is adapted to the end of a safety fuse, whereby it is ignited."

The full specification of this patent was filed on the sixth of November, 1867. It read thus: "This invention relates to the use of nitro-glycerine in an altered condition, which renders it far more practical and safe for use. The altered condition of the nitro-glycerine is effected by causing it to be absorbed in porous inexplusive substances, such as charcoal, silica, paper, or similar materials, whereby it is converted into a powder, which I call dynamite, or Nobel's safety powder. By this absorption of the nitro-glycerine in some porous substance, it acquires the property of being in a high degree insensible to shocks, and it can also be burned over fire without exploding. The aforesaid safety powder or dynamite is exploded first, when under very close and resisting confinement, by means of a spark, or any mode of ignition used for firing ordinary gunpowder; second, without or during confinement, by means of a special fulminating cap, containing a strong charge of fulminate, which is adapted to the end of a fuse, and is strongly squeezed to the latter, for the

purpose of more effectually confining the charge, so as thereby to heighten the effect of the detonation; third, by means of an additional charge of ordinary gunpowder, the explosion of the latter will cause the dynamite to go off, even when it is only partially confined. From the aforesaid it will be understood that a strong fulminating cap, if adapted to the fuse by being squeezed thereon, will cause dynamite to explode under all conditions of confinement or non-confinement, and that an additional charge of gunpowder or analogous substance will cause dynamite to explode only when confined, or partially confined, and that any ordinary mode of ignition, as used for gunpowder, for instance, a fuse, will determine the explosion of dynamite only under very close and resisting confinement. It is evident that the above described fulminating cap may be greatly varied in form, but the principle of its action lies in the sudden development of a very intense pressure or shock. In order to insure a perfect stability in the nitro-glycerine contained in the dynamite, the porous substance, before it is saturated with nitro-glycerine, is to be rendered alkaline by washing it with a solution of carbonate of soda, or lime-water, or analogous substance, in order to neutralize the acid and prevent any decomposition of nitro-glycerine from taking place. I would here remark, that the above described safety powder or dynamite, being nitro-glycerine absorbed in porous non-explosive substances, possesses many distinct properties from, and very practical advantages over, liquid nitro-glycerine, and its explosion, except under very close and resisting confinement, requires a special ignition, as described above." The claim is: "The mode herein set forth of manufacturing the safety powder or dynamite herein described, and also the modes of firing the same by special ignition, as herein set forth." This English patent was the precursor of the patent No. 78,317. The story of Dittmar, as told by him, is this: Before the end of 1865, at Bomlitz, near Walsrode, in Hanover, he experimented in mixing nitro-glycerine with nitro-cellulose, which was sawdust or wood fiber treated with nitric acid or nitric and sulphuric acids, and in mixing nitro-glycer-

ine with sawdust first treated with solutions of saltpetre and alkali. He conceived the idea that nitro-glycerine might be changed into a powder, so as to be a safe and efficient explosive. In July, 1866, at Berlin, Theodore Winckler, one of the firm of Alfred Nobel & Co., a firm composed of Nobel, Winckler and Dr. Bandmann, employed him to ascertain the causes of the accidental explosion of liquid nitro-glycerine packed in sawdust. He spoke to Winckler of his idea of changing liquid nitro-glycerine into a powder. He then supervised the erection of a nitro-glycerine factory for Nobel & Co., at Krummel, in Lauenburg, and remained there as its general superintendent until the fall of 1867. Noble returned to Krummel from the United States, in September, 1866.

In August, 1866, Dittmar experimented successfully in mixing nitro-glycerine with lamp black. He also experimented with ground bricks, charcoal, cement, and, lastly, infusorial earth, as absorbents for nitro-glycerine, continuing his experiments with sawdust and nitro-cellulose, and concluded that charcoal and infusorial earth were the best absorbents, the latter being preferable on account of its greater capacity of absorption. His attention was directed to infusorial earth as an absorbent because it was used at Nobel & Co.'s factory, in substitution for sawdust, to pack around the cans of liquid nitro-glycerine in boxes. He noticed that it was very porous, and readily absorbed the nitro-glycerine when the cans leaked. The particular experiments made by him with nitro-glycerine in combination with infusorial earth, as an absorbent, were made about the time Nobel returned, but whether before or immediately after he cannot remember. He did, however, make mixtures of nitro-glycerine with incombustible and inexplusive substances, as absorbents, long prior to the return of Nobel from the United States. Dittmar says: "Alfred Nobel returned in about the beginning of September, 1866. He came to the factory and had many conversations with me in respect of the mixtures of nitro-glycerine with absorbent substances. I had these conversations both with him and Mr. Winckler in his, Nobel's, presence. Nobel desired me to manufacture nitro-glycerine, and, for the purpose

of rendering it safe, to pour wood spirits or wood naphtha into the nitro-glycerine, and this I did, making large quantities of this mixture. Nobel insisted that this was the only safe mixture, and claimed that nitro-glycerine, to be rendered safe, must be retained in its liquid condition. He would not listen to representations I made to him that I was convinced, and such conviction had been verified by long and careful experiment, that nitro-glycerine, absorbed by some solid substance, cleansed of all impurities that would decompose it, would, in powder form, be a useful, efficient and safe explosive; and, when I told him of my experiments with sawdust, he ridiculed them and my projects as well, and insisted that I should refrain from making any such mixtures for the future, stating that it was all nonsense, that nitro-glycerine must be retained in its liquid form, that the admixture with wood spirits was the only safe one, and that any admixture with or absorption of nitro-glycerine by a solid substance rendered it even more dangerous than if left in its natural, *i. e.*, liquid condition." Dittmar continued his experiments, mixing nitro-glycerine with inexplusive incombustible substances, principally with infusorial earth. He did not explode them in any drill or rock holes, but fired them by means of a copper shell or cap, with fuse attached, the shell being charged with a strong fulminate and placed upon the mixture to be fired. The fuse exploding the fulminate, the jar caused thereby detonated the charge. Nobel often saw the compounds Dittmar was experimenting upon and the mixtures he was making, and Dittmar often, about the beginning of September, 1866, conversed with Nobel upon the subject of those experiments, the materials he was using, and the purpose he was seeking to attain. After Dittmar had perfected some of his first experimental mixtures of charcoal and nitro-glycerine, Winckler tried them at the mines and reported favorably on them, and then for the first time Nobel evinced some interest in Dittmar's experiments. Dittmar built a furnace and experimented with infusorial earth in quantities, mixed with nitro-glycerine. Nobel pretended not to notice what Dittmar was making there, never came in to look at the furnace, was not pleased with anything

that Dittmar made, and finally Dittmar refrained altogether from speaking to him on the subject. It thus became necessary for Dittmar to employ chiefly the time of Nobel's absence from Krummel to make those experiments, and, when Nobel was there, Dittmar experimented when not under Nobel's scrutiny.

Towards the end of October, 1866, Dittmar made public tests of his mixtures of nitro-glycerine with infusorial earth, as an absorbent, before government officers, at the factory at Krummel, in the presence of Nobel, Winckler and Bandmann, which tests proved eminently successful. The ingredients of such compounds were at that time known to Nobel, inasmuch as Dittmar had revealed to him what they were. Nobel, after the successful issue of such tests, and while Dittmar was further experimenting with infusorial earth in combination with nitro-glycerine, mixed some of the infusorial earth that had been tried and prepared by Dittmar, with nitro-glycerine, in a glass jar. The only original experiment ever made there by Nobel was that of painting sheets of common paper with liquid nitro-glycerine, and then rolling them up in the form of a cartridge. Dittmar says: "I continued my experiments, covering almost every known absorbent substance, both explosive and inexplusive, both combustible and incombustible, with the view of discovering that substance which, either naturally or under chemical treatment, would, without decomposition, absorb the largest quantity of nitro-glycerine without detracting from the explosive force thereof, and either assist or enhance the force of explosion, while at the same time rendering the compound a safe and efficient powder, until the fall of 1867, when I left the employment of Nobel & Co. From November, 1866, until I left their employment as aforesaid, I made large quantities of the compound, consisting of nitro-glycerine and infusorial earth, in the proportion of about 70 per cent. of nitro-glycerine to about 30 per cent. of infusorial earth, and these were sold during said period in open market. In the spring of 1867 Nobel stated to me that he was going to take a pleasure trip



to England. Owing to the fact that I had made shipments of nitro-glycerine to England, for Nobel's firm, I supposed that he was going to England in relation to such shipment and for pleasure simply, and did not suspect any motive or design on his part to overreach me. I therefore continued in the employment of his firm, and prosecuted my researches and experiments in nitro-glycerine combinations. During the summer of 1867 Nobel returned from England. He stated to me that he had visited England, and frequently came to my house, and, while there, inspected the experiments that I in the meantime had made in respect to nitro-glycerine combinations, and had many and extended conversations with me in respect thereto. I told him that the result of my experiments since his departure for England had demonstrated the advisability of preferring an explosive or combustible to an inert, inexplusive or incombustible substance as an absorbent, inasmuch as, as aforesaid, such inert matter detracted from the explosive force of the nitro-glycerine, while a combustible or explosive substance rather added to the force of the explosion, performing, at the same time, the identical functions in respect to reduction to powder form and safety in handling and transportation, and that sawdust, neutralized, so as to free it of all qualities that would decompose the nitro-glycerine, would, in combination with the latter and saltpetre, add to its explosive force in lieu of detracting from it, and could be fired without recourse to a strong fulminating cap, or would, in other words, be a compound in itself explosive by common ignition."

Dittmar left Nobel & Co.'s employment in the fall of 1867, and went to Berlin, to Capt. Schultze's factory, and became a partner in the business relating to the manufacture of explosive powders. He says: "While with Schultze I perfected that part of my invention relating to combinations of nitro-glycerine with combustible and explosive substances. \* \* \* I then applied for letters patent to the government of Great Britian and Ireland, making applications for like letters, also, to the governments of Russia and Prussia, respectively. The combination of nitro-glycerine with infu-

sorial earth having, by experiment, proved itself so much inferior to combinations with combustible and explosive substances, as absorbents, I, in my applications for such letters patent, wholly discarded inert substances, such as said infusorial earth, chalk, brick-dust and the like, and made such applications for combinations with combustible and explosive substances only. It was upon the return of my application to the British government that I was first informed of the fact that Nobel, during his sojourn in England, had applied for and obtained English letters for my invention aforesaid. The result of my application for an English patent was a provisional protection. \* \* \* \* The Prussian government refused to grant me letters patent, upon the application made by me as aforesaid, upon the ground that the mixture of nitro-glycerine and powder had been employed for blasting purposes." Dittmar allowed his Russian application to fall, and did not perfect a patent in England for what was covered in England by such provisional protection.

The English provisional protection consisted of a provisional specification, filed by one Johnson, December 5, 1867, on a communication from Dittmar. It was as follows: "Hitherto the employment of nitro-glycerine for blasting and similar purposes has been attended with considerable danger, and the object of this invention is not only to render its employment safe, but to enable it to be transported and stored free from its present attendant liability to explosion. In carrying out this invention the nitro-glycerine is mixed with a porous combustible substance, such, for example, as finely divided wood charcoal, which, by preference, has been previously saturated with a solution of saltpetre, or nitrate of soda, or mixtures of the same, and also with a solution of carbonate of soda, and subsequently dried, so as to expel the water employed for effecting such solution; or the nitro-glycerine may be mixed with what is known as nitro-cellulose, that is to say, with finely divided wood or other solid ligneous matter, which has been treated with nitric and sulphuric acid in a manner similar to that employed for the production of gun cotton; or the nitro-glycerine may be mixed with saw-

dust, or finely divided solid ligneous matter, previously impregnated with a solution of nitrate of potash, or nitrate of soda, or mixture of the same, and with an alkali, such as carbonate of soda, and subsequently dried, so as to expel the water employed for effecting the solution of the before-mentioned salts; or, instead of employing the substances prepared as herein before mentioned, in combination with nitro-glycerine individually, mixtures of the same may be employed, and, when such mixtures of any two or more of the before-mentioned substances are employed with nitro-glycerine, the proportions of the same may be varied according to the desired requirement of the blasting material."

Both the provisional and the full specifications of Nobel's English patent were filed before Dittmar's English provisional specification was filed. Nobel's full English specification distinctly says that the article he produces is a powder. The English provisional specification of Dittmar does not say that his article is a powder. No patent allowed to Dittmar, or printed publication of anything invented by him, is produced containing a description of what is described in reissue No. 5,799. The only question is as to whether Nobel, instead of having himself invented what is described in reissue No. 5,799, derived knowledge of it from Dittmar, in the manner and under the circumstances set up.

It is stated by Dittmar that, because of Nobel's dissatisfaction with his experiments, he experimented during Nobel's absence, and refrained from speaking to Nobel on the subject of such experiments; and, although Dittmar states that Nobel knew what the ingredients were of the compounds of nitro-glycerine and infusorial earth which Dittmar used in his public tests made in October, 1866, and that from November, 1866, until the fall of 1867, Dittmar made large quantities of the compound of nitro-glycerine and infusorial earth, in the proportion of about 70 per cent. of nitro-glycerine to about 30 per cent. of infusorial earth, it does not appear that these proportions were communicated by Dittmar to Nobel. There is nothing in Dittmar's story which goes to show that, after October, 1866, Nobel was not himself experimenting, without

the knowledge of Dittmar, with mixtures of nitro-glycerine and absorbents. Dittmar did not regard the compound he used in October, 1866, of nitro-glycerine and infusorial earth, as one of entire success, and as a compound showing a substance which would, without decomposition, absorb the largest quantity of nitro-glycerine without detracting from its explosive force, because, after October, 1866, he continued his experiments until the fall of 1867, with a view of discovering that substance. For some time before the fall of 1867 he seems to have confined his attention to mixtures of nitro-glycerine with sawdust. There is nothing in the entire statement of Dittmar which goes to show that Nobel derived from Dittmar knowledge of what is described in re-issue No. 5,799, or in patent No. 78,317, or that Dittmar made any invention that is described in his patent of January 18, 1870, before Nobel made the invention described in reissue No. 5,799.

If it were the fact that what Dittmar now says as to his being the real inventor of the invention described in reissue No. 5,799, amounted to enough to warrant the denial of the plaintiff's motion, it would be impossible to accept what he says as worthy of reliance, in view of the circumstances under which he says it now, after having been silent about it in former litigations, in one of which, the suit against Parker, he made an affidavit, the only purport of which was to show that reissue No. 5,799 was void for want of novelty.

In regard to the contention that the plaintiff has, by its conduct towards Dittmar, deprived itself of the right to a preliminary injunction, it appears that the plaintiff has been engaged in a series of litigations, for several years, to establish that reissue No. 5,799 covers powders substantially the same as those involved in this motion; that the plaintiff has done nothing to induce Dittmar to believe that a claim to the right on his part to make powders such as those involved in this motion was acquiesced in by the plaintiff; and that, on behalf of the plaintiff, Mr. Rix denies the allegations of Dittmar as to his making such powders without objection from the plaintiff; and as to there being any understanding or agreement between Rix and Dittmar that Dittmar was the real

inventor of what was covered by reissue No. 5,799, or that powders such as those involved in this motion did not infringe said reissue, or that Dittmar should withhold the testimony which he now brings forward.

There must be a preliminary injunction against Dittmar and the Dittmar Powder Manufacturing Company, as to powders like the samples No. 1 and No. 2. The plaintiff does not make out a case for an injunction against any of the other defendants. It does not offer any proof as to any articles made according to the Dittmar patent, and, therefore, it is unnecessary to refer to that patent, and none of the defendants but Dittmar and the company are shown to have been connected with the said samples.

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**DITTMAR v. RIX and another.**

*(Circuit Court, S. D. New York. March 13, 1880.)*

**PATENT—COMPOUND MADE BY PATENTED PROCESS.**—A patent containing two claims, the one for a certain process set forth, and the other for a certain compound made by the process set forth, is not infringed by the manufacture of a similar compound, not made by the patented process.

**Motion for preliminary injunction to restrain the infringement of letters patent.**

*Everett P. Wheeler and Clarence Lexow, for plaintiff.*

*George Gifford and Causten Browne, for defendants.*

**BLATCHFORD, J.** This is a motion for a preliminary injunction to restrain the infringement of letters patent granted to the plaintiff, January 18, 1870, for an "improvement in explosive compounds." The specification states that the patentee has invented an explosive agent which he calls "Dualin, and which is to be used instead of other explosive agents, such as powder, gun-cotton, nitro-glycerine, dynamite, etc." It proceeds: "Dualin is a yellowish brown powder, resembling in appearance Virginia smoking tobacco. It will, if lighted in the open air, burn without exploding; but, if confined, it may be made to explode in the same manner as com-

mon powder. It is not sensitive to concussion, will not decompose by itself, nor cake or pack together, may be readily filled into cartridges, and it matters not whether the place where it is stored be warm or cold, dry or damp. Dualin has from four to ten times the strength of common powder, and is stronger than dynamite, an improvement on nitro-glycerine. Some of the advantages claimed for dualin over other explosive agents are—*First*, it may be stored, transported, manipulated and applied with less risk than common powder; *second*, it may be used in cold weather without first requiring the warming process, which nitro-glycerine and dynamite require, and which frequently become inexplusive at a low temperature; *third*, its explosion does not develop any noxious gases; *fourth*, absolutely cheaper than either nitro-glycerine or dynamite, dualin is also relatively cheaper than common powder, for, possessing four to ten times the strength of the latter, its use will proportionately reduce the labor and cost of mining and blasting operations; *fifth*, the effect of a dualin explosion is to tear and rend the material exposed to its action, less than to pulverize it, as is the case with nitro-glycerine and dynamite, when applied to mining and blasting operations in coal and rock; *sixth*, dualin does not necessitate the application of a cap containing fulminate, but may be exploded by a fuse, like common powder; *seventh*, its entire want of sensitiveness to concussion renders dualin a suitable material for the blasting charge of shells.

“Description of the process: Dualin consists of cellulose, nitro-cellulose, nitro-starch, nitro-mannite and nitro-glycerine, mixed in different combinations, depending on the degree of strength which it is desired the powder should possess in adapting its use to various purposes. Cellulose is prepared by reducing wood of a soft texture (for instance, pine or poplar) to small grains, resembling sawdust, and treating them with diluted acids, and then boiling them in a solution of soda. After having been thoroughly dried, by a quick drying process, the cellulose is mixed with—No. 1. Nitre and nitro-glycerine. Or No. 2. Being first changed into nitro-cellulose, by being treated with nitric acid (48° B.) and sulphuric acid, (66° B.)

it is then mixed with nitro-glycerine. No. 3. The dried cellulose is mixed with anhydrous glycerine, until the mass becomes of the consistency of thick broth. This is gradually treated to a bath composed of a mixture of sulphuric acid ( $66^{\circ}$  B.) and nitric acid ( $48^{\circ}$  B.) of eight to ten times its quantity, during which process the greatest care must be taken to stir the heated mixture and cool it. The stirring is continued for at least half an hour, after which the mixture is placed in a water bath of ten times its quantity. The acid water being repeatedly drawn off and replaced by pure water the mixture is now placed in a bath of diluted soda lye. In this it is stirred from one to two hours, again washed in pure water, and then rendered anhydrous by means of hot water heating, and treating it with concentrated sulphuric acid and chloride of calcium. After having been rendered anhydrous, it is mixed with cellulose, prepared by process described under No. 1, 2 or 4, until a dry and not very greasy powder is obtained. The dust is sifted out, and this, if packed into cartridges, is serviceable. The powder remaining possesses the advantages above enumerated. No. 4. The cellulose is charred, finely pulverized, boiled in concentrated nitre lye, and, after soda has been added, is rapidly dried, and mixed with nitro-glycerine or dualin, prepared by process No. 1, 2 or 3. No. 5. The process of preparing nitro-starch, another ingredient of dualin, is also new. It will prevent the formation of lumps after the starch has been subjected to the acids, and also render the dried preparation less sensitive to dampness. a. Starch is thoroughly dried until it assumes a yellowish brown color. It is then finely pulverized and mixed with anhydrous glycerine. The mass is slowly placed in a mixture of nitric acid ( $48^{\circ}$  B.) and sulphuric acid ( $66^{\circ}$  B.) of ten times its quantity, during which process the greatest care must again be taken to stir the mixture and cool it. The stirring is continued for half an hour, when the mixture is placed in a water bath. The acid water being repeatedly drawn off and replaced by pure water, the mixture is now placed in a bath of soda lye, then placed in another water bath, and finally rendered anhydrous by means of hot water

heating and treating it with concentrated sulphuric acid and chloride of calcium. It is now pressed through a fine sieve, and mixed with either dried pulverized starch that has been treated with nitre lye, or it is mixed with cellulose prepared as above described, until a dry and not very greasy powder is obtained. *b.* After the starch has been dried it is mixed with pulverized cellulose, or with the dualin dust prepared by process No. 3. This mass is then placed in a mixture of nitric acid (48° B.) and sulphuric acid, (66° B.) and for the rest, treated as described by process No. 5. No. 6. In an entirely analogous manner, mannite is mixed with anhydrous glycerine and compounded with the other ingredients of dualin. I do not claim nitro-glycerine, nor mixtures of nitro-glycerine with other explosive or non-explosive materials, as such have been made, but they do not possess the properties of my compound."

There are two claims, as follows: "1. The process of manufacture or preparation of a compound which I denominate 'dualin,' of the ingredients, in the proportions and for the purposes set forth. 2. Also the new compound, herein described, called dualin, made by the process herein set forth, or its chemical equivalent."

The powder alleged to infringe the patent is one which, by an analysis shown by the plaintiff, contains, in 100 parts by weight, the following substances, in the following proportions: Nitro-glycerine, 36.78 per cent.; nitre, 47.45 per cent.; cellulose, 13.50 per cent.; volatile matter, moisture, 212° Fahr., 2.27 per cent. It is claimed by the plaintiff that the nitre and the cellulose in such powder are the ingredients specifically mentioned in the plaintiff's patent, under process No. 1 therein, as to be mixed with nitro-glycerine, and that the resulting powder is a powder answering the description of said patent. The powder is one made and sold by the defendants as "Giant Powder No. 2." The defendants admit that they use, in making it, nitro-glycerine and nitre, the latter in the form of nitrate of potash or nitrate of soda, and a carbon or hydrocarbon, such as soft or hard coal, resin or wood fiber. They allege that the wood fiber is mostly common saw-



dust, produced by sawing and dried; that they have never treated it with any acid or liquid, and have never boiled it in a solution of soda or any other solution; that, when dried, it is mixed with dry and pulverized nitre; and that that mixture is mixed with nitro-glycerine. It is contended, for the plaintiff, that the defendants' powder infringes his patent, because it is made according to process No. 1 therein. The first claim of the patent is for the process set forth. The second claim is for the compound made by the process set forth. The process is made essential in each claim. The process for preparing the cellulose is to treat the grains of wood or sawdust with diluted acids and then boil them in a solution of soda. They are then dried and mixed with nitre and nitro-glycerine. The defendants do not treat the sawdust with any acid or boil it in any solution. The plaintiff contends that the treatment of the sawdust or wood fiber with the acids and the alkali is designed to rid it of impurities, and leave the carbon, as the explosive force of the mixture depends on the purity of the carbon; and that the advantages of the compound are attained by the defendants, though in an inferior degree. But the difficulty is that the defendants use nothing in the place of the treatment by acids and an alkali, and the plaintiff has made such treatment essential, and does not say that it may be dispensed with. It is an essential part of the process, and is not used, nor is any chemical equivalent for it used. The compound is claimed only when made by the process set forth, and the process is claimed only as set forth.

It is unnecessary to pass on any of the other numerous questions discussed on the motion. The motion is denied because of non-infringement.

## THE GUIDING STAR.

(District Court, D. Kentucky. March 4, 1880.)

**ADMIRALTY—ACTION IN REM—CLAIM FOR AN ASSAULT BY AN OFFICER.—**

In an action *in rem* a seaman cannot join a claim for wages with one for an assault and battery by an officer of the vessel.

In admiralty. Exceptions to libel for multifariousness.

The libel claimed for the services of libellant as seaman upon a round trip from Madison, Indiana, to New Orleans, and alleged that the master shipped him under a contract to serve as roustabout at one dollar per day, and also "to receive kind and humane treatment, and his board or rations during the trip, and to be brought back to Madison." It further alleged that before the completion of the round trip, and near Caseyville, Ky., the mate struck him, "by color of his authority as such mate, several blows upon his head and neck, and kicked him in the sides; threw him against the front steps, and landed him against his will, at the coal mines near Caseyville, and the master of the boat permitted this to be done without protecting libellant or preventing any of these outrages." He claimed for wages, for rations, and for his fare back to his home, amounting in all to \$39.50, and also claimed \$3,000 for the assault, by reason of which he alleged he had been crippled and made sick, and his health had been greatly injured, and he had been incapacitated from doing work.

Claimant excepted to the libel upon the ground that libellant had joined causes of action *ex delicto* and *ex contractu*, and because the steamer was not liable *in rem* for the beating complained of, and this court had no jurisdiction to condemn and subject it to the satisfaction of said alleged damages.

I. H. Trabue and L. N. Dembitz, for libellant.

Barr, Goodloe & Humphrey, for claimant.

BROWN, J. The only question raised by the exceptions is, whether a seaman, in an action *in rem*, can join a claim for wages with a claim for an assault and battery by an officer of the vessel. Doubtless a court of admiralty may entertain

jurisdiction *in personam* of suits for assaults, and I see no reason to doubt that a seaman may join in an action for wages a claim against the vessel for injuries received by such acts of negligence as the ship is liable for, in a proceeding *in rem*; but, by General Admiralty Rule 16, "in all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only."

It seems to be the opinion of Mr. Benedict, however, (Benedict's Admiralty, § 309,) that this rule is confined to cases technically for assault and battery as a mere tort, and that if the action be brought on a contract, as for not carrying a passenger safely, or without injury, or for not treating with kindness a passenger or seaman, an assault or beating being the gravamen of the breach, that the suit may be *in rem* against the vessel. No authorities, however, are cited to this proposition, and upon a careful examination I have been unable to find any which lends it support. It is true there are certain cases *in rem* in which the libellant may join any number of demands, and in cases *in personam* claims *ex delicto* and *ex contractu* are not infrequently joined in the same libel. Dunlap's Admiralty, 89.

The question here involved is discussed in but a single case, viz., *Pratt v. Thomas*, 1 Ware's Rep. 427, in which the learned judge for the district of Maine considers the subject with his usual thoroughness, and comes to a conclusion that a claim for damages for a personal wrong is an entirely independent claim, and perfectly unconnected with that for wages. This case is a much stronger one against a joinder than the one at the bar, as it was a libel *in personam* against the master.

If it had been supposed that the court could entertain jurisdiction *in rem* of a suit for an assault, it is incredible that precedents for such suits should not be found in the books, for cases of aggravated assaults upon seamen are of the commonest occurrence. Upon the contrary, in all reported cases of this kind the actions are *in personam* only. *The Agincourt*, 1 Hagg. 271; *The Lowther Castle*, Id. 384; *The Enchantress*,

Id. 395; *The Ruckers*, 4 Rob. 73; *Chamberlain v. Chandler*, 3 Mass. 242; *Peterson v. Watson*, Blatch. & How. 487; *Thomas v. Gray*, Id. 493; *Treadwell v. Joseph*, 1 Sumn. 390; *Williams & Bruce's Adm. Pr.* 61; *Butler v. McLeeann*, 1 Ware, 219; *Forbes v. Parsons*, Crabbe, 283; *Fuller v. Colby*, 3 W. & M. 1; *Anderson v. Ross*, 2 Saw. 91.

Doubtless a seamen is entitled to be cured of his wounds at the expense of the ship, and to his wages during his sickness; and I know of no reason why libellant might not have joined a claim of this kind with one for wages. 2 Pars. on Ship. 80-85; *The Lillie Hopkins*, 1 Wood, 170; *The Bradish Johnson*, Id. 301; *The D. S. Cage*, Id. 401; *The Ben Flint*, 1 Biss. 567. His claim for damages, however, is rather for the pain and suffering endured than the expense of cure; in other words, it is a claim for an assault and battery, and not for wages and medical attendance.

An act of congress making the damages occasioned by assaults of officers upon seamen a lien upon the ship may be the only effectual means of checking the brutality and inhumanity so frequently seen on shipboard, but I am satisfied that the law at present warrants no such method of procedure.

The exceptions must therefore be sustained.

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THE N. Y. & BROOKLYN FERRY CO. v. THE STEAM-TUG "ADRIATIC" AND THE ICE-BARGE "FITCH."

THE SHALER & HALL QUARRY CO. v. THE SAME.

(District Court, E. D. New York. March 10, 1880.)

COLLISION—BARGE IN TOW OF TUG—SCHOONER STRUCK BY BARGE AND DRIVEN INTO FERRY-BOAT.

In admiralty.

*Beebe, Wilcox & Hobbs*, for libellants.

*C. Van Santvoord* and *Macklay & Mudge*, for tug and barge.

BENEDIOT, J. These two actions were tried together. The first is brought to recover of the tug Adriatic and the ice-barge

Fitch the damages caused by a collision between the schooner David Curry and the ferry-boat Nevada, in the East river, on the seventeenth of December, 1877. The second is brought by the owners of the schooner David Curry, to recover of the same tug and barge the damages caused to that schooner by the same collision, as well as the damages caused to the schooner by a prior collision between the schooner and the ice-barge, that occurred immediately prior to the collision between the schooner and the ferry-boat, and is claimed to have been the sole cause of such subsequent collision.

The following are my conclusions upon the evidence:

The ferry-boat Nevada was proceeding down the East river above the Catharine ferry-slip, on the Brooklyn shore, the tide being ebb. She was where she had the right to be, and was giving plenty of room for the vessels passing up the river to go by her in safety. While so proceeding she was run in to on the starboard side by the schooner David Curry, and sustained serious injuries. The cause of this collision between the ferry-boat and the schooner was a sudden change of course on the part of the schooner which carried her into the ferry-boat.

The schooner was proceeding up the East river, and in about the middle thereof. While so proceeding she was run into on her port bow by the ice-barge Fitch which was also proceeding up the river, between the schooner and the New York shore, in tow of the tug Adriatic. The immediate and necessary result of this collision between the ice-barge and the schooner was to knock the schooner off her course so suddenly that it was impossible for anything to be done either on the schooner or the ferry-boat to prevent the schooner from running into the ferry-boat, as above stated.

The cause of the collision between the ice-barge and the schooner was a sheer on the part of the barge out of her proper course and into the course of the schooner. It was the duty of the ice-barge, under the circumstances, to keep away from the course of the schooner, and she could have done so by the proper management of her helm. The schooner did nothing to cause the collision between her and the barge; it was the duty of the schooner to hold her course,

and this duty was performed up to the time when the ice-barge ran into her.

No fault on the part of the tug Adriatic contributed to the collision.

From these conclusions it results that the owners of the ferry-boat are entitled to recover their damages of the ice-barge Fitch. A decree will therefore be entered to that effect in the first entitled cause, with an order of reference to ascertain the amount.

A similar decree will be entered in favor of the libellant in the second suit.

In each of the suits the libel against the Adriatic will be dismissed with costs.

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**BLACKWELL and another v. BRAUN and another.**

*(District Court, D. Maryland. January 16, 1880.)*

**REMOVAL OF CAUSE—ACT MARCH 3, 1875.**—The words, "at the term at which said cause could be first tried," contained in the act of March 3, 1875, relating to the removal of causes, *held* to mean, "the first term at which the pleadings were in condition for trial; that is to say, when the issues were made up." *Gurnee v. County of Brunswick*, 1 Hughes, 270, followed.

**BOND, J.** This is a motion to remand the cause removed from the circuit court of Baltimore city, under the act of March 3, 1875. We agree with the counsel of complainant that the case, the legality of the removal of which we are now to determine, is that case which is made by the amended bill and answer. This amended bill was filed January 26, 1876, and the amended answer was filed on February 4th, and the replication on the twenty-fourth of February, in the same year. The motion to remove was made March 27, 1879. Three years had elapsed since the cause was at issue; nothing more had to be done to the cause. It was ready for hearing. It might have been heard on bill and answer at any term during the whole of three years, but the parties were

not ready. They desired testimony. But it is not the condition of the proof in a cause that determines the right of removal, but the condition of the pleadings; when the cause is at issue it can be tried.

The absence in an equity suit of an outstanding commission does not settle the question whether or not the cause can be tried, any more than the absence of a witness in a suit at law would determine whether it was triable or not. To discover that an equity cause is ready for trial it is not necessary to find that it was ever set for hearing. The cause must be triable before it can be set for hearing. How long before it was heard it might have been heard depends upon the diligence of counsel.

The words of the statute, "at the term at which said cause could be first tried," it might be contended, should be construed to mean either the term at which the issues were made up; or the term at which the judge was present and had an opportunity to hear the case; or the term at which the engagements of counsel allowed them to attend; or the term at which all the requisite witnesses could be procured or their depositions taken; but it has been found that the only reasonable construction to be put upon these words of the statute is the first term at which the pleadings were in condition for trial; that is to say, when the issues were made up.

We think this cause could have been tried at the term when the replication was filed, February 24, 1876, and must adhere to the ruling in the case of *Gurnee v. The County of Brunswick*, 1 Hughes, 270, and will direct the case to be remanded.

## GAUSE v. CITY OF CLARKSVILLE.

*(Circuit Court, E. D. Missouri. March 9, 1880.,***MUNICIPAL CORPORATION—VOID BONDS—APPLICATION OF MONEY.—**

Where a city without power to make negotiable obligations sells its void bonds, and, receiving the money therefor, applies it to its legitimate corporate uses, an action will lie to recover the money so received and applied.

**SAME—ASSIGNMENT OF BONDS—ACTION BY ASSIGNEE.—**The right to recover money so received is transferred by the transfer of the bonds, and can be enforced by the last holder of such bonds as the assignee thereof. *Wood v. Louisiana*, (MS.) U. S. Circuit Court, E. D. Missouri, September term, 1878, affirmed.

**SAME—VOID BONDS—ACTION BY HOLDER.—**Where a bond is made by a city for two considerations, as to one of which it has power to make a bond, but as to the other has none, such bond is wholly void. The holder cannot recover on the bond as such. His remedy is an action for money had and received.

**VALID BOND SURRENDERED FOR VOID BOND—ACTION ON SURRENDERED BOND.—**Where the holder of a valid bond presents it when due to the maker, and receives in payment a renewal bond, which for any reason is void, then the old bond, though surrendered for cancellation, is not extinguished, but recovery may be had on it the same as if the new bond had not been given.

**CITY ORDINANCE—ISSUE OF BONDS—RECITAL—ESTOPPEL.—**A city ordinance, authorizing a subscription to stock of a road company and issue of bonds to pay same, recited that the authority prescribed by the law as a prerequisite of such subscription had been given by an election held for the purpose. In a suit upon such bonds, *held*, that the city was estopped by such recital to show that the voters at such election were not duly sworn, and the election therefore void. Principle of estoppel by recitals in bonds applies to recitals in an ordinance authorizing the issue of bonds.

**PLEA IN ABATEMENT—JURISDICTION—CAPACITY TO SUE.—**All matters which go to challenge the jurisdiction of the court, or the capacity of the plaintiff to sue, should be presented by plea in abatement, in advance of hearing on the merits, unless the want of jurisdiction is put in issue by some pleading. Evidence tending to show cause is irrelevant and will not be heard.

Action upon 27 negotiable bonds of defendant, payable to bearer, of divers dates and amounts, and acquired by plaintiff after due. The amended petition contained 27 special counts based on said several bonds, respectively, together with two  
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common counts for money had and received, etc. The bonds described in counts 1 to 11, inclusive, were therein alleged, and by the evidence were shown, to have been given for money borrowed by defendant from the original payees, for the purpose either of building or improving its wharves or streets, or of paying for a city cemetery, and to have been actually used for those purposes.

Upon demurrer to like counts in the original petition all these bonds were held to be void, for want of an express grant of power in the charter of defendant to make bonds or borrow money.

The bonds described in counts 12 to 17, inclusive, were therein alleged to have been made either in direct payment of subscriptions made by defendant to stock of certain road companies, organized under the laws of Missouri to build gravel roads leading from the defendant city to other places in Missouri, by virtue of an act approved in 1857, (Sess. Acts Mo. 1857, p. 302,) or in renewal of other bonds originally so given in payment of such subscriptions. The evidence showed that the allegations as to all of these bonds were true, with the exception of those described in counts 12 and 13. As to these it appeared that while eight-tenths of their consideration was the payment or renewal of bonds so given in payment of road subscriptions, the remaining two-tenths was money borrowed from the holders of said bonds, and applied to the general uses of defendant.

As to the bond described in the fourteenth count, it also appeared that when due it was surrendered to defendant by its then holder in exchange for a new bond of like amount, and bearing a like rate of interest, but which was made on April 20, 1872, and had not been registered according to the law of Missouri passed March 30, 1872, which required all bonds issued after its passage to be registered. Sess. Acts 1872, p. 56, § 4. It also appeared that after the old bond had been surrendered it came again into possession of its holder at maturity, who transferred it to the plaintiff, who, at the trial, produced it, together with the void renewal bond, and offered to surrender the latter to defendant. The bonds de-

scribed in counts 18 to 27, inclusive, were alleged and shown to have been made in payment of a subscription by defendant to the stock of a company organized to build a gravel road from the ferry landing in Illinois, opposite to Clarksville, to other points in Illinois, under a law of Missouri authorizing such subscription upon condition that the assent of the citizens was first obtained by an election. Sess. Acts 1866, p. 254. It was also alleged that such assent was in fact obtained at an election held on October 2, 1866.

Defendant pleaded as a special defence that this election was not valid because the voters were not registered, but at the trial conceded that no registration law was in force at the time of the election, and then claimed and attempted to prove that the election was invalid because the voters were not sworn as required by section 5 of article 2 of the constitution of Missouri of 1865.

The evidence showed that the road company negotiated the bonds for value, before maturing, to sundry persons, by whom they were transferred to plaintiff; also, that the subscription was authorized by an ordinance passed by defendant's city council in January, 1867, in the preamble of which was the following recital, to-wit:

"Whereas, the legislature of Missouri, by an act approved March 12, 1866, so amended the charter of the city of Clarksville as to authorize the city council to take stock in roads leading to the city or to the ferry landing opposite to the city, in Illinois, by first obtaining the assent of two-thirds of the legal voters of the city thereto, and *whereas, at an especial election held for that purpose at the city hall on the second day of October, 1866, the authority was so given* \* \* \* \* \* to subscribe the sum of \$15,000: \* \* \* Now, therefore, be it ordained," etc., etc.

It also appeared that the bonds were issued in payment of the subscription only as the work on the road was finished, and that defendant received and voted the stock so subscribed, and still retained the same. Two of these bonds bore date April 1, 1872, two days after the passage of the act requiring registration of bonds, (Sess. Acts 1872, p. 56,) and

appeared never to have been registered as required by that act. At the trial, and after the cause had been heard upon its merits, defendant, without having in any way pleaded any want of jurisdiction in the court or of competency of plaintiff to sue, offered to show that all the bonds sued on were owned by residents of Missouri, and had been transferred by them to plaintiff, a resident of Texas, without value, and merely to have him sue thereon in the United States court, and to avoid suing thereon in the state courts. Plaintiff objected to such evidence as irrelevant, and the same was heard subject to such objection, the court reserving its decision as to its relevancy till the final determination of the case.

*Dryden & Dryden*, of counsel for plaintiff, cited the following authorities: 1 Peters, 450; *Id.* 498; 6 How. 4; *Id.* 23 and 30; 7 How. 198; 14 How. 505; 18 How. 76; 20 How. 264; 3 Sawyer, 599; 57 Mo. 86; 14 Mo. 428; 28 Mo. 597; 35 Mo. 461; 40 Mo. 67; *Pomeroy on Rem.* §§ 128-130; *Gauss v. Clarksville*, 8 Cent. L. J. 364; *Dillon on Mun. Corp.* § 730; 22 Mo. 266; 4 Dill. 208; 21 N. Y. 490; *Mayor v. Ray*, 19 Wall. 484; *Wood v. Louisiana*, (MS.) U. S. Circuit Court, E. D. Mo.; 1 Daniel Nego. Inst. §§ 201, 204; 2 Kent's Com. (side,) 467; *Story on Bills*, § 184; 14 Pick. 198; 16 Ohio St. (N. S.) 123; 15 N. Y. 96; 1 Wall. 221, 222; 10 Peters, 343; 2 W. & S. 235; 25 Ind. 31; 25 Ark. 350; 2 Daniel Nego. Inst. § 1274; 43 Vt. 319; 73 Pa. St. 400; 8 Cowen, 77; 2 Pars. N. & B. 205; 2 Bailey, 574; 19 Mo. 637; 33 Mo. 583; 24 How. 287; 99 U. S. 86; 92 U. S. 484; *Id.* 494.

*Wagner, Dyer & Emmons*, of counsel for defendant, cited the following authorities: 1 Kent's Com. 349; 2 Wagner's St. page 991, § 2, and page 1015, § 12; *Myers' Supp. to Wag. St.* page 304, § 12; *Aud v. Burrows*, 1 Otto, 426; *Ex parte McNiel*, 13 Wall. 243; *Pom. Rem.* pp. 155, 677, 707; *Thompson v. Railroad*, 6 Wall. 134; 1 Wagner's St., title, "Interest," § 1; *Southgate v. A. & P. R.* 61 Mo. 89; *Story Prom. Notes*, §§ 190, 191; *Andrews v. Pond*, 13 Pet. 65; *Fowler v. Brantley*, 14 Pet. 321; *Parsons v. Jackson*, 9 Otto, 441; *Mercer County v. Hackett*. 1 Wall. 83; *Van Hastro v. Madison*

*County, Id.* 291; *Hackett v. Ottawa*, 9 Otto, 86; *Town of Weyauwega v. Ayling, Id.* 112; *Supervisors v. Galbraith, Id.* 214; *Brooklyn v. Ins. Co. Id.* 362; *Orleans v. Platt, Id.* 677.

TREAT, J. Most of the legal propositions involved in this case were heretofore decided on the demurrers to some of the counts. 8 Am. Law Reg. 497.

In the case of *Wood v. The City of Louisiana*, recognized as correct by Judge Dillon in his opinion on said demurrers, it was held that although a municipality issued bonds which it had no authority to issue, and no recovery could be had on the bonds as such, yet if the money derived therefrom was received for an authorized purpose and applied to that purpose, an action would lie as for money had and received, and that the *bona fide* holder of said bonds could recover as assignee of the original demand.

This doctrine receives some support from the views expressed in the case of *Little Rock v. National Bank*, 98 U. S. Rep. 308, and *Shirk v. Pulaski County*, 4 Dill. 209.

Accepting the doctrines thus stated, it was for the plaintiff to prove what amount the city actually received for wharf and for street improvement bonds, respectively. The evidence shows that these bonds sold at *par*, and that the proceeds thereof were paid into the city treasury, and expended for the specific purposes designated. There were ordinances of the city authorizing said improvements, and making the needed appropriations therefor, all of which were lawful, and the money raised therefor by the sale of said bonds faithfully applied. Hence, under the rulings heretofore made in this case, the plaintiff is entitled to recover the amounts so actually loaned, with unpaid interest due from date of demand, at the rate of 6 per cent.

The city bought a cemetery lot, to pay for which it borrowed \$1,500, and issued a bond for \$1,650. As there was no power to issue a bond therefor, the recovery can be only for \$1,500, with unpaid interest, at the rate of 6 per cent.

The foregoing items cover all the counts, from the first to the eleventh, inclusive, on which, as held, there can be no

recovery; but that the plaintiff would be remitted to his count for money had and received.

The demands embraced in counts from 12 to 17, inclusive, are on bonds issued in payment for subscription to gravel roads, held by Judge Dillon to be a lawful exercise of municipal authority, from which view I dissented. As his ruling must prevail, the only question open under this head is as to two of said bonds, which the evidence shows were issued on renewal, not for part payment of said subscription alone, but for an additional sum also, then borrowed for general uses of the city. It has been contended that said bonds, though invalid, *pro tanto*, as to the amount in excess of what pertained to said subscription, should be held valid as to the amount included therein for which the city had authority to issue negotiable securities. If this were so, a suit on a specialty would necessarily require an examination into the various items of the consideration therefor, and thus, instead of proceeding as on a specialty, with the legal presumption arising therefrom, cause the single demand under one legal head to be split into an indefinite number of demands under various heads.

As to those two bonds of this last named series, therefore, the recovery must be had under the count for money had and received; while on the other bonds the recovery will be had as on specialties, according, to their tenor. The counts from 18 to 27, inclusive, are also on subscription bonds. To these bonds it is objected that the required assent of the voters was not obtained, because, though numerically the needed vote was given, yet the voters were not registered, nor did they take the oath prescribed by the state constitution of 1865. It was conceded, but if not, such is the fact, that the registration clause alluded to was not then in force. No doubt the prerequisite of the oath for qualification to vote was then in operation. Whether such oath was duly administered or not to each voter is doubtful, in the light of the testimony; and if not administered to all, how many voters failed to take it is still more uncertain. It seems that the vote was nearly unanimous in favor of the proposition; so

that, if the inquiry were to extend to each vote, it might appear that the required number of qualified voters did assent to the subscription.

The ascertainment of the precise facts in this regard is considered unimportant, inasmuch as the ordinance under which these bonds were issued recites that the needed election was duly had, etc. If a recital on the face of the bonds estops the municipality, as held in all similar cases on municipal bonds, the same rule should obtain when the recital is in the city ordinance; for the reason of the rule is the same in both instances.

Two of said bonds are dated after the registry act of the state was in force, and therefore are not valid, as bonds, on their face. An effort was made to show, by the evidence, that they were delivered before, and post-dated; but the court finds otherwise. Hence, the recovery on those two bonds must be as for money had and received. As to the fourteenth count the facts are, substantially, that the original bond was lawfully issued, and that the holder of said bond agreed to surrender the same and accept a renewal bond therefor. Said original bond was returned to the city, and what purported to be a renewal bond was issued in lieu thereof, but the latter bond was void, because the city failed to comply with the requirements of the then existing law. Hence, the original bond, being unsatisfied, remains a valid bond, on which a right of action can be maintained, such original bond being produced by plaintiff as the holder thereof.

There is a grave question of jurisdiction presented, relating to the plaintiff's interest in this suit. It seems that the bonds sued on, and the rights resulting from the assignment thereof, were transferred to the plaintiff, a citizen of Texas, for the purpose of having him sue thereon in a United States court—evidence concerning which was received, subject to the ruling of the court as to its admissibility under the issues. By the practice act of Missouri, as uniformly ruled, the holder of negotiable paper, to whom the same is transferred merely for the purpose of collection, can maintain an action thereon in his own name. But it is urged that if such transfer, or the

assignment of a demand, negotiable or non-negotiable, is for the purpose of having the same adjudicated in a United States court, there is a fraud on the jurisdiction of the latter court. Such a question should have been presented by a plea in abatement. This case furnishes an apt illustration. The time of counsel and court has been occupied for a long period on the merits of this controversy, when, if a plea in abatement had been interposed, a few hours might have sufficed for its determination. If the court, through issues made by pleas in abatement, or in bar, had ascertained that no jurisdiction exists, its judgment would be dismissed without passing on the merits. There are, however, no issues in this case under which evidence of the kind, to defeat the jurisdiction, can be received. There is no time at command to analyze the varied learning on the subject, and the decided cases to which the learned counsel have referred. A few are referred to in a note to this opinion. If practicable, a special finding would have been made as to each count; but this opinion will clearly show the conclusions reached and the grounds on which the decision rests.

NOTE.—*Conrad v. The Atlantic Ins. Co.* 1 Pet. 450; *De Wolf v. Raband*, 1 Pet. 476; *Sims v. Hundley*, 6 How. 1; *Bailey v. Dozier*, 6 How. 1; *Smith v. Kernschen*, 7 How. 198. This covers the whole ground on the jurisdictional question.

*Sheppard v. Graves*, 14 How. 505; *Jones v. League*, 18 How. 76. These cases discuss the question at great length, both as to pleadings and colorable assignments.

*Dred Scott v. Sandford*, 19 How. 393. This case seems to have held, though by a divided court, that, whether the want of jurisdiction appeared through a plea in abatement or in bar, the judgment of the court must be a dismissal, and not a judgment on the merits. In the case on trial there is no plea, either in abatement or in bar, under which the question can arise; or, in other words, there is no issue in which any evidence on the jurisdictional point could be admitted. Subsequently there was the case of *Spencer v. Lapsley*, 20 How. 264, in which no reference was made to the *Dred Scott* case, but in which it was held that pleas in abatement and in bar, at the same time, were irregular.

*Thompson v. Railroad Companies*, 6 Wall. 134, does not establish a different rule. That states proceedings in a court of equity—an old and familiar rule—and refers to the Ohio statute as to actions at law. In Missouri the real party in interest, or a trustee of an express trust, may sue.

## STEWART v. THE CHESAPEAKE AND OHIO CANAL Co. and others.

*(Circuit Court, D. Maryland. March 5, 1880.)*

**SUIT IN EQUITY—SUIT PENDING IN STATE COURT—DIFFERENT GROUNDS FOR RELIEF.**—A bill filed in behalf of the holder of certain corporation bonds secured by a trust mortgage, alleging the refusal of the trustees to proceed under the mortgage according to its provisions, and a misappropriation by the defendant of the tolls and revenues mortgaged, will not be dismissed because a bill, to which such trustees were made parties, had been previously filed in the state court to determine the priorities of the various lien creditors of the defendant corporation.

**SAME—PARTIES—NON-RESIDENT TRUSTEE.**—A non-resident trustee is not a necessary party to such suit, where four out of five of such mortgage trustees have been served with process and have duly answered.

**SAME—SAME—STATE OF MARYLAND.**—The State of Maryland is not a necessary party to such suit, although it owned four-fifths of the whole capital stock of the defendant corporation, and held a prior mortgage upon all the property of such corporation, including its tolls and revenues, when, by a subsequent act of the legislature of that state, the corporation had been duly authorized to mortgage its tolls and revenues to secure another loan and issue the bonds in suit for the same, and when it had been further enacted that the rights and liens of the state upon the tolls and revenues of the defendant should be "waived, deferred and postponed" in favor of the bonds so issued, so as to make such bonds, and the interest accruing thereon, preferred and absolute liens on the revenues of the defendant company, until such bonds, with the interest thereon, should be paid.

**PER CURIAM.** This suit is brought by Daniel K. Stewart, an alien, as a holder of the bonds issued by the defendant company, in his own right, and for the benefit of such others in like interest as may come in and support the suit. The facts alleged and admitted, which are necessary to determine the questions now submitted, are briefly these: The state of Maryland, desiring that a canal should be built from tidewater to Cumberland, in that state, chartered the defendant corporation and became a stockholder in it to the extent of 50,000 shares, each of the value at par of \$100. This was about five-eighths of the whole capital stock. From time to time, the corporation being unable to complete the canal with the money received from the subscriptions to its stock, the state loaned to it further sums of money, to secure the repayment t



of which it took mortgages from the defendant company upon all its property, including its tolls and revenues. The assistance thus had from the state's liberality proved insufficient to complete the canal to Cumberland, and the state, being unwilling to assist the corporation further by direct contributions of money, passed the act of 1844, chapter 281, by which the defendant was authorized to mortgage its tolls and revenues to secure another loan from the public generally, for which it was to issue its bonds in an amount not to exceed the sum of \$1,700,000, which was to be used to complete the canal to Cumberland. And by that statute it was enacted that the rights and liens of the state upon the revenues of the defendant should be "waived, deferred and postponed" in favor of the bonds issued under the act of 1844, chapter 281, so as to make such bonds and the interest accruing thereon preferred and absolute liens on the revenues of the defendant company until such bonds, with the interest thereon, should be fully paid. And the state further authorized the company, by the act referred to, to execute any deed, mortgage, or other instrument of writing deemed necessary or expedient to give the fullest effect to the provisions of the act. Authorized by this act, the defendant company issued the bonds mentioned therein and now in suit, and executed a mortgage upon its revenues and tolls arising from the entire and every part of the canal, to William W. Corcoran, of the District of Columbia, and four others, who having since died, four other citizens of the state of Maryland have been substituted in their places. By said mortgage, in certain contingencies, which the complainant alleges have arisen, the said trustees were to enter and receive possession of the canal, and collect the tolls and revenues thereof, and apply them as in said mortgage directed.

The complainant is a holder of the bonds, which, by the act last above referred to, are made preferred and absolute liens on the tolls and revenues of the defendant company, which are due and unpaid. The bill alleges that the complainant has applied to the trustees named in the mortgage above mentioned to proceed under it, and take possession of the

tolls and revenues of the defendant, according to its provisions, and that they have refused so to do. It alleges, likewise, misconduct on the part of the defendant, and misappropriation of its tolls and revenues; with which charges, at present, whether true or false, we have nothing to do.

The answer of the defendant, together with other defences with which we are not now concerned, sets up that there is a suit now pending between the commonwealth of Virginia and the defendant and others, in the circuit court of Baltimore city, embracing the same subject-matter between the same parties, and files as an exhibit the record of that case.

The mortgagee, Corcoran, by reason of his residence in the District of Columbia, is not made a party to this suit. His four co-trustees under the mortgage have been served with process, and have answered the bill. Under the fifty-second rule in equity, prescribed by the supreme court, the parties to this cause—the facts being as above stated—have, by stipulation of counsel, submitted three questions to the court, which are jurisdictional in their character, the first being: Is the state of Maryland an indispensable party to this suit? the second—Is not William W. Corcoran, one of the trustees, an indispensable party? and the third—Ought not the court to dismiss the bill altogether, and refer the parties to the state court, where a suit is alleged to be pending in which the complainant is a defendant, and where, as is claimed, he could have all his rights in this matter properly adjudicated?

We will consider these questions in the reverse order to that in which they have been presented.

Upon an examination of the record of the case in the state court we find that there was a bill filed in 1867 to determine merely the priorities of the various lien creditors who held the obligations of the defendant company. That bill certainly asked for a receiver of the rents, tolls and revenues of the defendant, but it clearly appears that what was intended by that action was to place in the hands of the receiver such surplus tolls and revenues only after they had been collected by the company, to be by him distributed to the parties after

the court had determined their respective priorities. These priorities were ascertained. The real object of that suit was accomplished, and nothing further has been done in it. It would be impossible for the present complainant, though through the trustees of the mortgage he was a party to that bill, to get the relief there which he seeks here. That bill alleges no such grounds for relief as are stated in the bill before us. Here is alleged fraud, misappropriation of the receipts of the defendant company, and gross misconduct of its officers. It would be impossible in the suit in the state court, unless the whole scope and purpose of it were changed, to give the complainant in this cause his remedy there. He could not file a cross-bill, for in that cause, though concluded by the appearance of his trustees, nothing was to be determined but the priority of his lien. He could not ask leave to amend the bill so as to include the subject-matter of the bill here filed, because he is not a party complainant there; and it appears further in this suit that all the alleged wrongs the complainant seeks to have redressed in this action occurred long after the determination of the questions involved in the suit in the state court, and, since further proceedings in it have been neglected or abandoned, the complainant, in our view, is entitled to have his rights adjudicated here. We have no power to send him to another tribunal, because at a former time, and to determine other rights than those claimed here, he sought the jurisdiction of that forum.

The question next submitted to us is whether we can proceed in this cause without the presence of William W Corcoran, who is one of the trustees in the mortgage which the complainant is seeking to enforce. Corcoran cannot be made a party by reason of his residence in the District of Columbia. Four out of five of the trustees named in this mortgage are present in court. They have been brought here by the process of the court, and have answered. Whether or not Corcoran is an indispensable or even a necessary party to the bill depends upon one fact. If the court can determine, by its decree, the rights of these *cestui que trusts* under the mortgage without deciding what the rights of the trustee Corcoran

are, then the court is at liberty to proceed. But Corcoran has no interest. He is a mere trustee for the purpose of doing a duty upon a certain contingency. He holds a public trust. He has no title to anything. He has no legal estate in any property. His claim for compensation, even in the event of his being called upon to exercise the trust reposed in him, is a matter not fixed by law, but is altogether within the discretion of a court of equity. The *cestui que trusts* are abundantly represented in this action by a majority of their trustees. If but one of them were in court we should consider that their interests were sufficiently protected against any possible harm from an adverse decree.

The next question submitted is whether the state of Maryland ought not to be made a party. The defendant alleges that the state is an indispensable party. We have seen, by the recital of the act of the assembly of Maryland, (Statutes 1844, c. 281,) that the state had a mortgage on all the property of the defendant company, together with its tolls and revenues. By that act the state authorized the defendant to borrow more money upon the pledge of its tolls and revenues, and declared that the defendant might pledge the same, and make the debt so incurred a preferred and absolute lien on such tolls and revenues until the same was paid.

This is a suit against the defendant company to enforce the pledge which the state authorized it to make, and which it did make, with the complainant. It must appear to every one who considers the circumstances under which the waiver of the state lien was made, and these bonds issued, that no one would have taken them if it had been understood that in order to enforce the lien there was a necessity to do what it was impossible to do, namely, make the state a party to the proceedings. Maryland waived its lien. She agreed with the defendant company, not with the bondholders, that it might make such bargain as it could with the bondholders, and that neither she nor her lien should stand in the way of enforcement of the contract against the canal company. Under this authority and agreement—which was by public statute—the defendant contracted with the bondholders. It

pledged the revenues and tolls upon which the state had theretofore a prior lien as between the canal, its stockholders and itself. This suit is to compel the defendant company to fulfil the obligation it then entered into. It would be a gross deception on the part of the state to plead that while she waived her lien she never intended to have the mortgage of the tolls enforced. The state does not set up this defence, but the defendant company seeks to shield itself behind it. In our judgment, the state of Maryland, when it authorized the defendant to deal with the public under the act of 1844, chapter 281, and to borrow money by the pledge of its tolls and revenues, waiving its lien, said that to the extent of the loan the state had no interest in the property of defendant. All the state's prior dealings with the defendant were not to be considered. All the rights were waived, sovereignty and all, and were subordinated to the contract of the purchasers of these bonds with the defendant company.

The purchasers of the bonds dealt with the canal company, the now defendant, and it ought not to be allowed to set up any interest of the state to defeat the enforcement of its contract. All questions of the distribution of the surplus revenues of the canal company have been conclusively determined by the state court in the action above alluded to, in which the state was a party. The bonds which complainant holds are an undisputed first mortgage debt, having priority over every claim of the state, which lien and priority have been determined by the state courts. If the state has any interest whatever which it thinks is not here properly defended by the defendant, whom she authorized to deal in her behalf with these bondholders, she is at liberty to come here and in this court protect her rights. But the defendant is not to be allowed, after making a contract which was authorized by the state, to set up by way of defence against its enforcement that the state is not made a party, and cannot be without the state's consent, and thus defeat the contract. This complainant did not deal with the state. He dealt with the defendant company. It is against it these complainants seek to enforce their claim, and the defendant, having made a

contract of its own by the authority of the state, has no right to set up the state's supposed interest to defeat an action to enforce it.

No relief sought by the bill would, by any decree we are asked to pass, conclude any rights of the state of Maryland. We are of opinion that these objections to the complainant's bill must be overruled.

MARGARET BUCKMAN, by her next friend, etc., v. THE PALISADE LAND COMPANY and others.

(Circuit Court, D. New Jersey. March 16, 1880.)

REMOVAL OF CAUSE—NECESSARY PARTIES TO PETITION—ACT OF MARCH 3, 1875.—Where the removal of a cause is prayed for under the act of March 3, 1875, upon the ground that "the controversy in the suit is between citizens of different states," it is necessary that all the parties, plaintiff or defendant, should join in the petition for removal.

SAME—SUIT BY A MARRIED WOMAN—NEXT FRIEND—In a suit by a married woman, her next friend has no interest in any controversy involved in the suit, within the meaning of the act of March 3, 1875.

Motion by plaintiff to remand.

NIXON, J. The motion is to remand this suit to the court of chancery of New Jersey, in which proceedings have been taken to remove it into this court under the act of March 3, 1875.

The bill of complaint was filed in that court by Margaret Buckman, a citizen of the state of New York, wife of Elisha Buckman, by her next friend, Samuel M. Hopping, a citizen of the state of New Jersey, for the foreclosure of a certain indenture of mortgage to secure the sum of \$272,286.75, executed by one John L. Bronnell and wife to the defendant Elisha Buckman, on various tracts of land in the county of Bergen, and state of New Jersey, and alleged to have been assigned by the said Elisha to his wife, the complainant, through one Richard L. Simonson.

Elisha Buckman, living apart from his wife, was also a cit-

izen of the state of New York, and was made a party to the suit, that he might be decreed to deliver over to the complainant the custody and possession of the mortgage and bond and assignments, which, it was alleged, he had unlawfully retained after his transfer of the same to the complainant. The bill contained the prayer that if the said complainant should fail to get the possession of the bond, mortgage and assignments, the said bond and mortgage might be foreclosed without such possession, and proof made of the amount due thereon. The other defendants were made parties, either because they had become purchasers of some portion of the mortgaged premises, subject to the lien of the mortgage, or because they were the judgment creditors of Elisha Ruckman, and had attached his right and interest in the mortgage by proceedings in foreign attachment, by virtue of which they claimed to have a lien upon the mortgage debt.

The petition for the removal of the cause into this court was filed by the defendant Elisha Ruckman under the second section of the act of congress of March 3, 1875, which provides "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, \* \* \* in which there shall be a controversy between citizens of different states, \* \* \* either party may remove said suit into the circuit court of the United States for the proper district. And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit into the circuit court," etc.

It will be observed that there are two clauses to this section, the first having reference to a suit in which there is a controversy between citizens of different states, and the second to a suit in which there is a controversy which is wholly between citizens of different states, and which can be fully determined as between them. A suit of the first

character is only removable when either party—i. e., all of the plaintiffs or all of the defendants—join in the petition for removal. *National Union Bank of Dover v. Dodge*, 25 Int. Rev. Rec. 304. But a suit of the second character may be removed by one or more of the plaintiffs or defendants actually interested in such controversy. If the present cause is removable by these proceedings, it must be under the last clause of the section, as only one of the defendants has filed the petition.

We have, then, to consider these two questions: (1) Does the suit embrace a controversy which is wholly between citizens of different states, and which can be fully determined as between them? (2) Has the defendant Ruckman an actual interest in such controversy? If both are answered in the affirmative the removal is within the law, otherwise the cause must be remanded.

It is conceded that a suit may include more than one controversy. There may be several. Many different subjects of controversy are often involved in a suit, in some of which one or more of the defendants are actually interested, and the other defendants are not.

In *Taylor v. Rockefeller*, 18 Am. Law Reg. 307, Mr. Justice Strong, in interpreting this clause of the third section of the act, says: "The right of removal is given where any one of these controversies is wholly between citizens of different states, and can be fully determined, as between them, though there may be other defendants actually interested in other controversies embraced in the suit. The clause 'a controversy which can be fully determined as between them,' read in connection with the other words, 'actually interested in such controversy,' implies that there may be other parties to the suit, and even necessary parties, who are not entitled to remove it. Such other parties must be indispensable to a determination of that controversy, which is wholly between the citizens of different states, or their being parties to the action is no obstacle to the removal of the case into the circuit court."



In determining the question of the jurisdiction of this court in the case we must look at the petition for removal, and the bill and answer filed, and ascertain whether such a controversy is found as the act of congress prescribes.

None such is suggested in the petition. The removal is prayed for because the controversy in the suit is between citizens of different states. But that is one of the grounds of removal stated in the first clause of the section, in which the united action of all the defendants or all the plaintiffs is necessary to make the petition operative.

I might rest the decision of the motion upon this, and remand the cause, (*Gold Washing & Water Co. v. Keyes*, 6 Otto, 201,) but as it was not adverted to in the argument, and another question was fully discussed, it will not be improper for me to give it some attention.

It will be observed that Margaret Ruckman, being a *feme covert*, has filed her bill of complaint, by her next friend, Samuel M. Hopping, who is a citizen of the state of New Jersey. It was insisted, on the hearing, that he thus became a necessary party to the suit, and as the petitioner for the removal was a citizen of New York, and the said Hopping a citizen of New Jersey, a controversy existed between citizens of different states.

It was in accordance with the long established principles of equity practice for the complainant, a *feme covert*, to file the bill by her next friend. It may be doubted, however, in view of the legislation of New Jersey in regard to married women, whether such a course was necessary. The eleventh section of the married women's act, (Rev. St. of N. J. 638,) provides that a married woman may maintain an action in her own name for the recovery of money, and all property, real or personal, which by that act was declared to be her separate property.

But, whether a necessary party or not, the next friend thus introduced has no possible interest in any controversy involved in the suit. No decree could be made for him, whereby he would be personally benefited, or against him, except for costs, if the real complainant failed to establish her claim to

the property. in ascertaining the actual parties to the controversy we must look at the substance and not at the mere form. The bill was filed by Mrs. Ruckman for the foreclosure of a mortgage, and in the suit there was involved a controversy with her husband as to the rights of ownership and possession of the original papers evidencing the existence of the mortgage. The petitioner was, doubtless, actually interested in that question, and so was the complainant. It was the principal controversy in the suit. The husband and wife were the real parties to it, and both are citizens and residents of the state of New York.

But, besides this, admit it to be true that Samuel M. Hopping was a necessary party, what controversy arises in the proceedings which is wholly between him and the petitioner, and which can be fully determined as between them? Surely, not the controversy about the ownership and possession of the bonds and mortgages, because Mrs. Ruckman has an interest in that question, and was an indispensable party in a suit for its determination.

In short, I am unable to find in the petition or the pleadings any facts which warrant the removal by the defendant Ruckman, and the cause must be remanded to the court of chancery of New Jersey, with costs.

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GARRETT and others v. SAYLES and others.

SAYLES and others v. GARRETT and others.

(*Circuit Court, D. Rhode Island. March 1, 1880.*)

**CORPORATION—PERSONAL LIABILITY OF STOCKHOLDERS—BONDS SECURED BY MORTGAGE OF CORPORATE PROPERTY.**—The issue of negotiable bonds, secured by mortgage upon all the property of a corporation, and allotted *pro rata* to the stockholders, does not relieve such stockholders from their personal liability, under the statutes of Rhode Island, to the assignees of such bonds.

**BANKRUPT STOCKHOLDER—CONTINUING LIABILITY—INDEMNITY OF ASSIGNEE IN BANKRUPTCY.**—A stipulation by a purchaser of such bonds to indemnify the assignees in bankruptcy of the original holder of a part of such bonds against all liability as a stockholder in said corporation, does not relieve the bankrupt or other members of the corporation from their personal obligation to the purchaser of such bonds.

The American File Company was incorporated by an act of the legislature of Rhode Island in May, 1863, and was organized in the June following. The company bought a patent under which the manufacture of files had been before carried on in Baltimore, and the persons who sold them the patent took nearly one-half the stock of the new company. The capital appears to have been insufficient for the business, and for some years money was raised or credit was obtained upon the notes of the company, indorsed by the stockholders, all of whom were liable for the debts of the company under the statutes of Rhode Island, relating to manufacturing corporations, by reason of the omission to file certain statements necessary to relieve that liability.

In 1870 the company duly resolved to issue bonds, secured by a mortgage of all their corporate property, real and personal, to be offered to the stockholders, *pro rata*, until April 1, 1870, and such as were not then taken were to be disposed of "in the order of applicants." The bonds and mortgage were made accordingly. The bonds were payable to bearer in five years from January 1, 1870, with interest at 10 per cent. per annum, for which coupons were attached to them. Allen A. Chapman was the principal stockholder in Baltimore, and he took and paid for, in the indorsed notes of the company, the full proportion of bonds allotted to the stockholders in that city. The notes with which he paid for them belonged to his firm of Kirkland, Chase & Co. Several of the smaller stockholders refused to subscribe, and he, or his firm, retained the bonds.

Kirkland Chase & Co. were merchants doing a large business in Baltimore, and for 30 years or more they had dealt with the plaintiffs, Robert Garrett & Sons, bankers, of Baltimore, and among other things they used to borrow money of the bankers upon collateral security. In the summer of 1872

the current debt was about \$500,000. Among other loans was one of \$50,000, made May 10, 1872, for which notes of third persons were deposited. These were afterwards exchanged for a cargo of sugar imported by the Shiloh, for which Kirkland, Chase & Co. deposited with Garrett & Sons the warehouse receipt. By the arrangement between the parties all securities were to be held for the general balance of account.

Kirkland, Chase & Co. failed, July 11, 1872, and it was then made known, for the first time, to Garrett & Sons that the cargo of sugar had been sold on the thirtieth of May, while they still held the warehouse receipt. Presently, after the failure, Chapman handed to Garrett & Sons, instead of the cargo of sugar, the bonds of the file company, with an assignment, dated May 30, 1872. The firm of Kirkland Chase & Co. and each of its members, became bankrupt in October, 1872, and the assignees disputed the title of Garrett & Sons to these bonds and several other securities as a fraudulent preference. A settlement was afterwards made by which the assignees relinquished all title to the several securities, and paid certain moneys to Garrett & Sons, and the latter relinquished the right to prove against the assets for the excess of their debt above the value of the securities, which turned out to be a very considerable sum. The agreement, which was approved by the court of bankruptcy and carried out, was in writing, and contained this stipulation: "And said Robert Garrett & Sons likewise further agree that, whereas, said assignees have been offered the sum of 50 cents on a dollar for certain bonds of the American File Company, now held by Messrs. Robert Garrett & Sons, which were received as collaterals from Messrs. Kirkland, Chase & Co., and an indemnification against loss or damage of any kind as holders of certain stock of said American File company as assignees of A. A. Chapman and Kirkland, Chase & Co., said Robert Garrett & Sons hereby agree to indemnify said assignees against loss or damage of any kind as holders of the stock aforesaid; and, in consideration of said acts of said assignees, said Robert Garrett & Sons do

also hereby agree to indemnify the said assignees, and the estate of Kirkland, Chase & Co., and the estate of A. A. Chapman, against loss or damage of any kind, for releasing their claim to said bonds of the American File Company, now held by Messrs. Robert Garrett & Sons, and agree to hold said assignees and said estates harmless for said transfer and release."

The affairs of said Kirkland, Chase & Co. had been nearly settled, and the several bankrupts had been discharged, before this case was begun.

In June, 1876, Garrett & Sons brought an action upon the bonds in the supreme court of Rhode Island, and recovered judgment against the American File Company, the amount of principal and interest \$132,611.33, with \$51.10 costs.

As the law then stood, creditors recovering judgment against a manufacturing corporation, whose stockholders were liable for its debts, might levy their execution upon the persons and property of such stockholders, as if for their own proper debts. The Rhode Island stockholders of the file company thereupon filed a bill in equity in the supreme court of Rhode Island to enjoin Garrett & Sons from levying their execution upon them or their property, alleging that when the bonds of the corporation were issued, in 1870, the arrangement was that the bonds were a final payment of the debts of the company, relieving the stockholders from liability, and requiring them to look for payment of the bonds only to the property which was mortgaged to secure them, or at all events to the property of the company, and not to the personal responsibility of the stockholders; that Garrett & Sons had notice of this equity when they acquired their title to the bonds, and stood in the place of Chapman, or Kirkland, Chase & Co.; that the plaintiffs had besides agreed to indemnify the assignees of those shareholders, and that a court of equity would enforce that liability in a suit between the plaintiffs and defendants, to save the circuitry of action which would ensue if the defendants should call on the assignees for contribution, and they again on the plaintiffs for indemnity. To

this bill Garrett & Sons filed an answer, and the plaintiffs replied. The cause was then removed to this court.

In 1877 the legislature of Rhode Island passed an act taking away the right to levy upon stockholders an execution upon a judgment against such corporations, and substituting a suit in equity, or action of debt. Garrett & Sons afterwards brought a bill in this court against the stockholders of the file company resident in Rhode Island, to which they filed an answer, setting up the same equities which they had relied on in their bill filed to restrain the execution. Evidence was taken to be used in both cases, and they were heard together.

*James Tillinghast and John K. Cowen, for Garrett & Sons.*

*A. Payne and Chas. Hart, for W. F. Sayles and others.*

LOWELL, J. For convenience, we shall call Garrett & Sons, plaintiffs, and Sayles and others, stockholders of the American File Company, defendants.

We need not consider the bill filed in the state court by these defendants to restrain the plaintiffs' levy of execution, and removed to this court, because our power to stay a process issuing out of the state court is doubtful, unless when such injunction had been issued while the case was in the state court; and because the plaintiffs, while insisting that the law of 1877, abolishing the remedy by levy upon the stockholders and substituting a bill in equity, cannot be enforced against them consistently with the constitution of the United States, or with that of Rhode Island, have acquiesced in fact and brought their bill in this court under that act, and the pleadings in that suit raise all the questions between the parties.

The defendants, admitting that they are stockholders of the corporation and liable generally for its debts, set up against these plaintiffs two equitable defences.

The first is that the stockholders, in the year 1870, agreed to pay the debts of the company in substantial accordance with their respective ultimate liabilities, *inter sese*, by taking bonds in that proportion, and to look for reimbursement to the property conveyed in mortgage to trustees to secure the

bonds, or to that property and any which the company might afterwards acquire.

We see no evidence that the parties concerned, the stockholders, made any such agreement as is here supposed. Being under a statute liability for the debts of the company, and choosing to remain so—for they could have put an end to this state of things by filing an annual statement of their affairs—they found it more convenient to raise money by negotiating bonds with five years to run, rather than notes which needed to be often renewed. They secured their negotiable bonds by a mortgage, in order to increase their value, not to diminish it. It was an ordinary arrangement, which had no concealed equities. The negotiable bonds were to be negotiable, and to have the same properties in the hands of the shareholders as in those of other “applicants” who should take them. No doubt one principal motive which induced the shareholders to take the bonds in the first instance was that the company must be kept afloat; but there was no agreement expressed, and none arises from the nature of the transaction, that the bonds should not be sold, or that they should hold good only against the property of the company.

We suppose it to have been taken for granted that the bonds were amply secured, in which case no such question as is now before us could have arisen. At any rate, it appears, from the correspondence between the parties and from the votes, and all the evidence in the record, that the bonds were intended to be what they purport to be, the negotiable promises of the corporation, as much so as the notes for which they were substituted.

The second defence is that the plaintiffs have agreed to stand in the place of stockholders by their stipulation to indemnify the assignees of Chapman as such stockholders.

We agree that if the assignees, when this stipulation was made, were stockholders in the sense of being liable for the debts of the company, the defence is a good one to the extent of their proportionate share of the debts, so that the plaintiffs could only recover in equity the difference between the price of their bonds and such proportionate liability. This

equity does not depend upon privity of contract, but upon an equitable duty. *Dering v. Earl of Winchelsea*, 1 Lead. Cas. Eq. (4th Am. Ed.) and notes.

We are of opinion, however, that under the statutes of Rhode Island neither assignees in bankruptcy, nor the assets in their hands, are liable to contribute under the circumstances stated in the record, which are, simply, that they have in their possession the certificates of stock, and recite in the agreement with the plaintiffs that they are stockholders. It does not appear how far, if at all, they have acted as stockholders, and it is certain that they had nothing to do with contracting this debt.

In Massachusetts, where the law is as nearly as possible identical with that of Rhode Island, the liability was held not to attach, though the assignees had attended and voted at meetings of the stockholders, and done other unequivocal acts of ownership. *Gray v. Coffin*, 9 Cush. 192.

The general law of bankruptcy would give the same answer to the question. It is an anomaly, perhaps, but it is the undoubted rule, that assignees are not bound to accept onerous property. Its application to leaseholds is familiar. *Mills v. Aureol*, 1 Smith Lead. Cases, (7th Am. Ed.) 1116 and notes; and as to an onerous litigation or contract, *Smith v. Jordan*, 6 Law Rep. 313; *Streeter v. Sumner*, 31 N. H. 542; *Amory v. Lawrence*, 3 Clifford, 523.

The rule has been often applied to shares in a company liable to the *onus* of assessments, or calls, as they are called in England, and would apply *a fortiori* to an unlimited liability. See *Re Lond & Prov. Teleg. Co.* L. Rg. Eq. 653; *South Staffordshire R. Co. v. Burnside*, 5 Ex. 129; *Levi v. Ayres*, 3 App. Cas. 342; *Metropolitan Bk. v. Offord*, L. R. 10 Eq. 398.

The peculiar statutory liability imposed upon shareholders in New England is not one which can be proved as a debt against a bankrupt's assets unless it is liquidated and ascertained by a decree in equity before the time for proving debts has gone by. *Kelton v. Phillips*, 3 Met. 62; *Bangs v. Lincoln*, 10 Gray, 600; *James v. Atlantic Delaware Co.* 11 N. B. R. 390. It follows that Chapman, or the several members



of his firm, according to the fact of ownership, would remain personally liable to contribute to the debts of the corporation notwithstanding their discharge in bankruptcy, because only provable debts are discharged, and because they would remain shareholders. See *Martin's Patent Co. v. Morton*, L. R. 32, B. 306; *Hasties Case*, L. R. 7, Eq. 3, 4 Ch. 274. It is plain, upon inspection of the contract between the plaintiffs and the assignees of Kirkland, Chase & Co., that the former did not undertake to become stockholders of the corporation, nor to indemnify Chapman or the members of the firm personally, but that out of abundant caution the assignees took an indemnity for themselves and the estate in their hands, and, since the assignees are not liable, there is no claim or right to which the defendants can be subrogated.

Equity might require the plaintiffs to apply the mortgaged property, or to call upon the trustees of the mortgage to apply it to diminish the debt, so far as it would go, before a final decree should be rendered against the defendants. The pleadings do not raise this question, and we understood at the argument that the property had been converted into money and would be properly disposed of without the intervention of the court. We decide, therefore, that in the bill filed by Garrett & Sons, there must be an interlocutory decree for complainants.

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LINDER, Assignee, etc., v. LEWIS and others.

(District Court, S. D. New York. January 22, 1880.)

**FINAL DECREE—MOTION TO OPEN JUDGMENT AFTER CLOSE OF TERM.—**

After the term at which a final judgment or decree is entered, the courts of the United States have no power to open the judgment or decree, and grant a rehearing, or let a defendant in to answer, unless, at the time at which the judgment or decree is entered, some order is made virtually keeping the judgment open for further relief or proceedings.

**SAME—OMISSION TO ENTER ORDER THAT THE BILL BE TAKEN PRO CON-**

**FESSO.—**The omission to enter a formal order that the bill be taken *pro confesso* against the defendants, will not affect the regularity of a final decree or make it any less absolute.

*J. H. Drake*, for motion.

*G. H. Yeaman*, *contra*.

CHOATE, J. This is a motion to open a final decree entered at the September term 1879, whereby the defendants Wettstein, Meyer and Ochninger were decreed to pay to the complainant, as assignee in bankruptcy of Wallach & Co., the sum of \$3,109.24. These defendants were judgment creditors of Wallach & Co. before their bankruptcy, and after the execution of a general assignment for the benefit of creditors by the bankrupts, and before the filing of the original petition in bankruptcy, these defendants and several other judgment creditors took out their executions and placed them in the hands of the sheriff, who levied on goods covered by the general assignment.

Afterwards, the sheriff requiring indemnity before he would sell the goods, the several judgment creditors, defendants, indemnified him, but some of the judgment creditors withdrew their bonds and took action, which has been held in this suit to exempt them from liability to account to the complainant for the proceeds of the goods sold by the sheriff. The suit was brought against the general assignee, the sheriff and the judgment creditors to set aside the voluntary assignment, and to compel the sheriff and the judgment creditors to account for and pay over the value of the goods sold. The final decree was for the complainant, setting aside the assignment, and charging the sheriff and the judgment creditors, who did not withdraw their authority to the sheriff, with the proceeds of the goods.

These moving defendants were duly served with process and appeared in the suit, but put in no answer. Their time to answer was twice extended by stipulation. It appears now, by the moving papers, that through some misapprehension on the part of their attorney he was led to believe that no substantial relief was sought against them in the suit. They were, however, regularly served with notice of all the proceedings in the cause, had notice of the applications for the interlocutory and for the final decree, which was entered, as above stated, at the last September term. They now

claim that they have the same precise defence which has been sustained as to other defendants; that is, that before the sale they withdrew the sheriff's authority to sell on their account, and that they have lost the opportunity to make this defence solely through this mistake of their attorney. Meanwhile, the others, defendants, who were charged by the decree, have appealed to the circuit court, and the marshal has taken proceedings to enforce the entire decree against these defendants.

The case is clearly one in which the court would gladly give these parties relief if it had the power. They are apparently in the position of being called on to pay what other defendants, upon the same state of facts, have been held not liable to pay, and if the appeal of the defendants who have been charged should be sustained, they are also charged with what will in that case be held to have been a claim not well founded against any of the defendants. But it is clear that, after the term at which a final judgment or decree is entered, the courts of the United States have no power to open the judgment or decree and grant a rehearing, or let a defendant in to answer, unless at the time at which the judgment or decree is entered some order is made virtually keeping the judgment open for further relief or proceedings. Supr. Ct. Rules in Eq. 18 and 19; *Mueller v. Ehlers*, 1 Otto, 249; *Scott v. Blaine*, 1 Bald. 287; *Herbert v. Butler*, 14 Bl. C. C. 357.

The rule is based on the theory that public and private interests require that there should be an end of litigation after a party has had his day in court, and ample opportunity to present and assert his rights by way of prosecution or defence. And in the courts of the United States this limit of litigation, subject to the right of appeal or review, is fixed at the end of the term of the court at which the final judgment is entered.

In this case these defendants had ample opportunity to present their defence, and it must be accounted their own negligence and laches that they did not do so. At any rate, the court is without power to relieve them on motion.

The only suggestion of irregularity in the proceedings in

the cause is, that no formal order appears to have been entered that the bill be taken *pro confesso* against these defendants. It is the ordinary practice to enter such an order, but I cannot say that the omission to do so affects the regularity of the final decree or makes it any less absolute.

The rules require that, if no answer or plea is put in, the bill shall be taken *pro confesso*, and the entry of the interlocutory decree upon notice, and of the final decree, also upon notice, must, I think, be held to be, in effect, equivalent to such an order. I do not perceive that the failure to enter the order, these defendants having full notice of all the proceedings, and being, of course, chargeable with notice that they had not answered, can possibly have prejudiced them, and the want of such an order is one of those defects of form, or such a want of form, as is referred to in Rev. St. § 954, which the court is required to disregard. See *Bank v. White*, 8 Pet. 262.

It is further suggested that as the complainant is an assignee in bankruptcy he is, more than plaintiffs ordinarily, under the control of the court, and that he should, therefore, be restrained, in the exercise of the powers of the court in bankruptcy, from taking an unconscionable advantage of these defendants for the benefit of the creditors of the bankrupts.

Whether this court, sitting in bankruptcy, could relieve these judgment debtors against the collection of this judgment on the ground that it could, as a court of bankruptcy, take notice of their alleged claims for equitable relief, and if so, whether it could be done against the objection of any creditor of the bankrupts; in other words, whether it would be within the powers of the court in bankruptcy to relieve them from that absolute estoppel by record to deny the obligation to pay this judgment, which the judgment itself creates, is a question which cannot be raised here, because this application is not made to the court sitting in bankruptcy, but to the court exercising its jurisdiction in equity, and bound by the rules established for such a court, and it is a motion in this very cause in which the decree must be held to import

absolute verity. And in this court, sitting in this cause in equity, the complainant certainly has all the rights of other suitors.

Motion denied.

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MUSER and another *v.* THE AMERICAN EXPRESS COMPANY.

(*Circuit Court, S. D. New York.* January 24, 1880.)

• COMMON CARRIER—LIMITATION OF LIABILITY—"LOSS OR DAMAGE BY FIRE"—NEGLIGENCE OF AGENT.—A stipulation in a receipt exempting an express company from liability "for any loss or damage by fire," does not relieve such company where such loss occurred through the negligence of a railroad company employed by the express company to transport the goods in controversy.

SAME—LIMITATION OF LIABILITY TO STIPULATED SUM—REAL VALUE NOT DISCLOSED.—A stipulation in a receipt limiting the liability of the carrier to a stated sum, is binding upon the shipper, in the absence of a disclosure as to the real value of the goods shipped.

WALLACE, J. The plaintiffs delivered to the American Express Company, at Syracuse, N. Y., a trunk with contents of the value of \$4,172 for transportation to New York city, taking a receipt, which, among other stipulations, contained those reading as follows: "This company is not to be held liable for any loss or damage by fire, \* \* \* nor in any event shall this company be held liable or responsible, nor shall any demand be made upon them, beyond the sum of \$50, at which sum said property is hereby valued unless the just and true value thereof is stated herein."

The value of the trunk and contents was not stated in the receipt, and no evidence was given to show that the agent of the defendant knew the value of the property. Through the negligence of the employes of the New York Central & Hudson River Railroad Company, which corporation was employed by the defendant to transport the property in question, the car in which the express company shipped the property for transportation to New York city was thrown from the track, and a fire ensued which destroyed the plaintiff's trunk and contents.

The question now is, whether the defendant is relieved from the responsibility by reason of the stipulations in the receipt, or, if not wholly absolved, whether it is liable for more than \$50.

It will not be profitable to review the authorities which consider the right of common carriers to limit or modify their common law liabilities by notices or special contracts. It is the settled law in the federal courts that common carriers cannot relieve themselves from liability for negligence either by notice or by special contract, though they may, by contract with the shipper, stipulate for such a reasonable modification of their common law liability as is not inconsistent with their essential duties to the public. They cannot, therefore, exonerate themselves from liability for the negligence of their own agents, but may from the acts or misconduct of persons over whom they have no authority or control, actual or legal. *York Co. v. Central R.* 3 Wall. 107; *R. Co. v. Lockwood*, 17 Wall. 357; *Bank of Kentucky v. Adams Exp. Co.* 93 U. S. 174.

The plaintiffs' property was destroyed by the negligence of the railroad company, the agent of the defendant, and the defendant is, therefore, liable, notwithstanding the stipulation against liability for fire.

The precise question presented under the stipulation limiting the defendant's liability to \$50, in the absence of a statement of the real value in the receipt, was decided in *Berry v. Dinsmore*, where at *nisi prius* I held such a stipulation valid. After a more careful consideration of the question than I was able to give I am confirmed in the conclusion then reached. The case of *Hopkins v. Wescott*, 6 Blatch. 64, which was not then called to my attention, is a controlling authority in this circuit, and decides that such a limitation is binding upon the shipper. To the same effect are *Belger v. Dinsmore*, 51 N. Y. 166; *Kirkland v. Dinsmore* 62 N. Y. 35; *Wagner v. Dinsmore*, 62 N. Y. 171 and 70 N. Y. 410.

The right of a carrier to exact fair information as to the value of property confided to his care has always been recognized. He has the right to insist that his compensation be measured by his risk, and, obviously, the degree of care which

he will exercise will measurably depend upon the extent of the responsibility he may incur. While it is not primarily the duty of the shipper to inform the carrier of the nature or value of the contents of the parcel sent, the carrier has the right to make inquiry and receive a true answer, and any concealment on the part of the shipper, intended to mislead the carrier as to the character or value of the property, and which does mislead, is a fraud which absolves the carrier from responsibility. *Sewell v. Allen*, 6 Wend. 347; *Phillips v. Earle*, 8 Pick. 182; *Brooke v. Pickwick*, 4 Bing. R. 218; *Riley v. Horner*, 5 Bing. 217; *Sleat v. Flagg*, 5 B. & A. 342; *Crouch v. L. & N. M. R.* 14 C. B. 255.

The question has generally arisen in cases where the carrier sought to protect himself under the terms of a general notice or regulation requiring the shipper to state the value or character of the property, and when the notice or regulation was brought to the knowledge of the shipper the carrier was protected by it. How much stronger is the case when, as here, the shipper enters into a contract by which he agrees that the property shall be valued at \$50 in the absence of specific statement of the real value.

In *Express Co. v. Caldwell*, 21 Wall. 264, a clause in a contract relieving the carrier from liability for any loss or damage to a package whatever, unless claim should be made therefor within a limited time, was sustained as a reasonable condition.

The stipulation in the present case is plainly as reasonable as was that in *Express Co. v. Caldwell*. In effect it exacts from the shipper only that fair information of the extent of the carrier's risk to which he is entitled.

Upon the argument it was contended that the stipulation could not shield the carrier from the consequences of his own misfeasance. Undoubtedly a carrier may so conduct himself with property entrusted to him as to divest himself of the character of a carrier. In such case his contract would not protect him. This is not such a case. Judgment is rendered for plaintiff for \$50, with interest from January 3, 1879.

**BEATTY and others v. HINCKLEY and Husband.**

*(Circuit Court, S. D. New York. January 20, 1880.)*

**BILL IN EQUITY—MULTIFARIOUSNESS—FRAUDULENT CONVEYANCE TO WIFE—GRANTEE, EXECUTRIX OF DECEASED GRANTOR.**—A bill in equity for an account against the executrix and former wife of a deceased trustee is not bad for multifariousness because it prays, among other things, for an account of the value of certain property fraudulently conveyed to such executrix by the testator in his life-time, in order to avoid liability for a breach of trust.

**In Equity.**

WHEELER, J. The wife, defendant, is executrix of the will of George I. Beatty, who was trustee, under the will of James Beatty, of lands and stocks, to receive and collect the rents, dividends and profits thereof, and pay the same to James L. Beatty during his life, with remainder over to the next of kin, who are the orators, and who disposed of the property absolutely, and paid over the avails, to the amount of about \$10,000, to the life tenant, who lost the same, and which has never been paid to the orators. She has assets belonging to the estate of her testator, and it is not contended but that she should account for those, and be decreed to pay the amount to the orators, but they are largely deficient.

After the loss of the funds by the life-tenant, he discharged the trustee from all further claim in his behalf; and the trustee conveyed to this defendant, then his wife, without any consideration, property of his own to a considerable amount, and more than was a reasonable provision for her, in view of his liability for violating this trust, and probably intending to defeat that liability, which she understood. It is argued, in her behalf, that this property, so conveyed to her, cannot be reached to satisfy this claim, and that if it can be reached at all, it cannot be in this suit, with the claim against her as executrix.

There is no pretence but that the claim of the orators was a just and lawful one against her testator in his life-time, nor but that it is a lawful one against his estate now. It seems



to follow, very plainly, that this voluntary conveyance of his property, for the purpose of defeating that claim, was fraudulent and void, as against the holders of the claim. No reference to particular authorities is necessary to establish this. But it is said that if that property can be followed into the hands of the wife defendant at all, the claim for it is distinct from that against her as executrix for the property belonging to the estate, of which she is executrix, and that joining the two makes the bill bad for multifariousness, which objection was seasonably taken; and *Ward v. Duke of Northumberland*, 2 Aust. 469, and *Sabridge v. Hyde*, Jacobs, 157, are strongly relied upon in support of the objection.

The claims, however, are not distinct. There is really but one claim, and that is in favor of the orators against the estate of the testator in her hands as executrix. That property is claimed because, as between her and the orators, it is a part of the same estate, to be reached in her hands in the same manner as any other part. If the property had been conveyed to a third party it would have been different. Then a suit against the other party would have been necessary, and she would be the proper party to bring it, and if she refused the orators could proceed against both. *Hagan v. Walker*, 14 How. 29. The cases mentioned as relied upon are both distinguishable from this in this respect. The orator in each had claims against the testator and against the executor in the life-time of the testator, each independant of the other. In attempting to enforce both in one suit they were pursuing distinct claims, and not, as is only attempted here, one claim against the same person in the same right.

Let a decree be entered for an account of the amount due the orators, and of the estate of the testator in the hands of the defendant executrix, and of the value of the personal estate mentioned in the bill as conveyed by the testator to her in his life-time, and the amount of the estate of the testator in her hands, and if necessary that so conveyed, or so much as is necessary, be paid to the orators in satisfaction of their claim, with costs.

## GEBHARD v. THE CANADA SOUTHERN RAILWAY COMPANY.

(Circuit Court, S. D. New York. January 24, 1880.)

**CONTRACT—PLACE OF PERFORMANCE—LEX FORI.**—The payment of certain first mortgage railroad bonds executed and issued in the dominion of Canada, and payable in the city of New York, is not discharged by virtue of an act of parliament of the dominion of Canada authorizing such railroad to issue new bonds, bearing a lower rate of interest, in substitution of such former bonds.

WALLACE, J. The plaintiff sues upon certain obligations executed and issued by the defendant representing instalments of interest due and unpaid upon the defendant's issue of first mortgage bonds. The case, for convenience, may be considered as though the action were brought to recover several instalments of interest due on the first day of January, 1877, upon the first mortgage bonds of the defendant. These bonds were executed and issued in Canada, but by their terms were payable at the city of New York.

The defendant is a Canadian corporation, and insists in defence that it is discharged from payment of these bonds by virtue of an act of the parliament of the Dominion of Canada, passed in April, 1878, whereby the defendant was authorized to issue new bonds, payable in 30 years, in substitution of its first mortgage bonds, and bearing a lower rate of interest. This act declares that the assent of the holders of the first mortgage bonds shall be deemed to have been given to the substitution of the new bonds. The plaintiff in fact never assented to the substitution of the new bonds in the place of the first bonds.

On first impression the defence seems an extraordinary one. It rests upon the theory that the original bonds having been issued in Canada are contracts controlled, as respects the obligation and its discharge, by the law of Canada; and that the Canadian parliament, in the exercise of its unlimited powers, has discharged or modified the obligation of the contract, and that, even though this be an arbitrary or unjust act, it is conclusive upon the rights of the parties.

Several general propositions applicable to the case are ele-

mentary. The law of the place of the contract determines the nature, the obligation, and interpretation of the contract. But when the contract is to be performed in a different place to that in which it is made, the law of the place of performance, in conformity to the presumed intention of the parties, determines the nature, obligation, and interpretation of the contract. A defence or discharge, good by the law of the place of the contract, is good wherever the contract is sought to be enforced; but when the place of performance is not the place where the contract was made, the defence or discharge is valid or invalid according to the law of the place of performance. The doctrine that a defence or discharge good by the law of the place of the contract is good everywhere, is subject to several qualifications, one of which is that the discharge or defence must not be of such character that it would conflict with the duty of the state where it is sought to be enforced towards its own citizens to recognize it.

The laws of a state have no extraterritorial vigor, and are enforced by other states only upon considerations of comity, and these always yield to those higher considerations which demand of every state the protection of its own citizens against the unwarrantable acts of a foreign sovereignty. These familiar general propositions require no citation from the authorities to support them. Applying them here the defence cannot succeed.

The plaintiff sues upon a contract which was made in Canada, but was to be performed in the state of New York, the place of payment being the place of performance; and a discharge of the obligation which derives its vitality solely from the authority of a foreign sovereignty, is of no more effect than would be the case if New York were the place where the contract was made. One of the most common instances, in illustration of the rule, is where the defence of usury is interposed, in an action brought here upon an obligation made in a foreign state, and bearing a higher rate of interest than is permitted by the laws of that state. When the obligation is payable here, the cases all agree that the usury laws of the foreign state have no application.

Another class of cases, more analogous to the present because they involve the effect of an *ex post facto* discharge of the obligation, is where a discharge in bankruptcy has been obtained under the laws of the state where the contract was made. Such a discharge is not a defence when the place of performance of the obligation is in a different state. The question has frequently been considered by the supreme court of the United States, and, although generally discussed in connection with constitutional questions, it has been ruled, with the concurrence of all the judges, that, irrespective of other considerations, the discharge is inoperative when obtained in a different state from that where the debt was payable, because the contract and its obligation cannot be affected by the legislation of other states. See opinions of *Grier*, *Daniel*, and *Woodbury*, JJ., in *Cook v. Moffat*, 5 How. 295.

The decision of the present case may properly rest upon this ground alone, but if the obligations in suit were Canadian contracts the defence would be untenable. The act of the Canadian parliament is an attempt to impair and destroy the obligation of a contract. Undoubtedly it was supposed, in view of the financial embarrassments of the defendant, that the new obligations authorized by the act would be acceptable to the holders of the original bonds, and would be of equal, if not of greater value. But the plaintiff was entitled to the money due by the terms of his bonds, and any legislative act which attempts to deprive him of it by compelling him to accept something different, violates fundamental principles of justice, and is in effect an arbitrary confiscation of the plaintiff's property. Although, by the theory of the British constitution, parliament is omnipotent, the jurists and statesmen of England have denied its right to transcend the boundaries which confine the discretion of parliament within the ancient landmarks.

When it was proposed by act of parliament to impair vested property rights by remodeling the charter of the East India Company, in 1783, the attempt was denounced by Lord Thurlow and Mr. Pitt "as a total subversion of the law and constitution of the country," and some of the greatest jurists and

judges of England have declared that an act of parliament against common right and natural equity is void. Angel on Corporations, § 767.

In our own country we regard such acts as so subversive of natural rights as not to be within the authority delegated to the legislative department of the government.

It is sometimes supposed that because the constitution of the United States prohibits the state from passing such laws, and is silent as to the United States, the authority to pass them resides in congress by implication. This is an erroneous assumption. As said by *Wilson, J.*, (13 Wend. 328,) "It is now considered an universal and fundamental proposition in every well regulated and properly administered government, whether embodied in a constitutional form or not, that private property cannot be taken for private purposes, nor for public, without just compensation, and that the obligation of contracts cannot be abrogated or essentially impaired. These and other vested rights of the citizen are held sacred and inviolable, even against the plentitude of power of the legislative department."

The same views are expressed by the learned author of *Cooley's Constitutional Limitations*, (176,) as follows: "However proper and prudent it may be expressly to prohibit those things which are not understood to be within the proper attributes of legislative power, such prohibition can never be essential when the extent of the power apportioned to the legislative department is found, upon examination, not to be broad enough to cover the obnoxious authority. The absence of such prohibition cannot, by implication, confer power."

A contract is property; to destroy it partially is to take it, and to do this by arbitrary legislative action is to do it without due process of law. *Sinking Fund Cases*, 99 U. S. 746-7.

If any of our own states had passed such an act as the one under consideration it would have been the duty of the courts of that state to treat it as an unlawful exercise of power; and certainly it cannot be expected that this court will tolerate legislation by a foreign state which it would not sanction if

passed here, and which, if allowed to operate, would seriously prejudice the rights of a citizen of this state.

Comity can ask no recognition of such unjust foreign legislation, and the case falls under the qualification of the general rule which prescribes that when the foreign law is repugnant to the fundamental principles of the *lex fori* it will be ignored.

Judgment for plaintiff.

### ROSENBACH v. DREYFUSS and another.

(District Court, S. D. New York. January 21, 1880.)

**PRACTICE—PLEADING—AMENDMENT AFTER DEMURRER.**—Under section 542 of the New York Code, as applied by section 914 of the Revised Statutes to the practice and pleading in the circuit and district courts within the state of New York, a complaint is amendable by the party at any time within 20 days after a demurrer thereto.

**AMENDMENT—AVERMENT OF STATUTE VIOLATED—SAME CAUSE OF ACTION.**—The amendment of a complaint by a change in the averment of the statute violated, does not set out a new cause of action where both statutes were substantially identical, and the last mentioned was passed as a substitute for the one first pleaded.

*Chittenden & Fiero*, for plaintiff.

*Koonce & Goldman*, for defendants.

CHOATE, J. This is an action to recover penalties for inserting notice of copyright on articles not copyrighted. The acts complained of are charged to have been done in the year 1878, and the complaint refers to the act of 1870, c. 230, § 98, as the statute violated.

On the seventh of July, 1879, the defendants filed and served a demurrer, alleging as grounds thereof—*First*, that the statute alleged to be violated was repealed by the Revised Statutes, § 5596; *second*, that, if liable under the statute, the defendants are liable only for one penalty of \$100 for the entire edition of the work published, instead of the like penalty for each copy printed; *third*, that the complaint does not state facts sufficient to constitute a cause of action; *fourth*, that the supposed causes of action are not set forth

fully or at large, but in an abbreviated form, different from the usual and established precedent in all cases, and that the complaint is in other respects uncertain, informal, and insufficient.

On the twenty-sixth of August, after the demurrer had been noticed for argument, the plaintiff served a paper entitled an "amended complaint," in form like the original complaint, except that the statute alleged to have been violated was Revised Statutes, § 5596, instead of Statutes 1870, *c.* 230, § 98. This paper was immediately returned by the defendants' attorneys to the plaintiff's attorneys, with a written notice that they refused to receive it "on the ground that the attempted service thereof, as a matter of course, is unauthorized by the law and practice of this court, and on the ground that, as we have served and filed a demurrer to plaintiff's declaration herein, you cannot cure the defects in such declaration demurred to except by leave of court, after argument and payment of costs on the demurrer."

The defendants now move to strike from the files, as a nullity, the paper called an amended complaint, and for general relief.

The New York Code of Procedure provides, (section 542,) that "within 20 days after a pleading, or the answer or demurrer thereto, is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs and without prejudice to the proceedings already had."

No point has been made that the 20 days after service of the demurrer had expired before the amended complaint was served. The written notice, returning it, put the refusal to receive it on other grounds. This was, perhaps, a waiver of the delay in serving the amended complaint. But, whether this is so or not, the parties upon the argument of this motion have put the case wholly upon other grounds, and submitted the question as one not of compliance, or failure to comply, with section 542 of the Code, but have rested the case on the question whether that section applies to actions at law

in the federal courts. This is, I think, a waiver of the delay in service.

Two objections, then, are urged against the regularity of the plaintiff's practice: (1) that section 542 of the Code is not applicable to this court; and (2) that the amended complaint states an entirely new cause of action, and on that ground is not, within the terms of section 542 of the Code, such an amendment as can be made in this way without leave of the court. 1 Stat. 1872, c. 255, § 5, as re-enacted in Rev. Stat. § 914, provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time, in like causes, in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

I think it is very clear that the mode of amending the complaint, as of course, according to section 542 of the Code, comes within the terms of the statute. It is a matter of "practice, pleading, form and mode of proceeding," nor is there any difficulty in its application growing out of the peculiar organization or powers of the federal courts. Since that statute was passed the plaintiff's first pleading in this court has been a "complaint," framed according to the principles of the New York Code, instead of a declaration as at common law, and the defendant's pleading has been, not a "plea," but an answer, framed according to the Code. For the same reason a demurrer, which is a pleading, should conform to the rules regulating demurrers contained in the state statute. Code, § 488. The demurrer in this case, except as to one of the alleged grounds, was not such a demurrer.

It is, however, objected by the defendant's counsel that Rev. St. § 954, still keeps in force the system of special demurrers which formerly obtained in this court, and that it is inconsistent with, and by necessary implication forbids, the application to the federal courts of the practice of amending the complaint without leave under section 542 of the Code.



Rev. St. § 954, is a re-enactment of the thirty-second section of the judiciary act of 1789, (c. 20, 1 St. 91.) It empowers generally any court of the United States to disregard mere defects of form in giving judgment except those which, in cases of demurrer, the party demurring specially sets down with his demurrer as the cause thereof, and authorizes the court to amend every such defect or want of form other than those which the party demurring so expresses, and any time to permit parties to amend any defect in process or pleadings upon such conditions as it shall in its discretion and by its rules prescribe.

The inserting of this section in the Revised Statutes is an indication of the understanding of congress that it has not been repealed by subsequent legislation, (Rev. St. §§ 5595, 5596;) nor is there any difficulty in giving effect to this section, as well as to section 914. When section 914 was first enacted, in 1872, it immediately changed the forms and modes of pleading, including demurrers in the federal courts within states whose local statutes had adopted a system of pleading unlike that to which section 32 of the act of 1789 evidently refers. And there can be no doubt that in New York the declaration, plea and special demurrer referred to in the thirty-second section of the judiciary act were superseded by the complaint, answer and demurrer under the New York Code. The inserting of this section in the Revised Statutes as section 954, was not designed to repeal the act of 1872, or modify it; and in construing the two sections together the time of their original enactments, respectively, will be considered, and have its due weight.

Now, the Revised Statutes having application to all parts of the United States, there was an obvious propriety in retaining the thirty-second section of the act of 1789, because there might be states in which the act of 1872 had effected no change in the system of pleading inconsistent with the system of special demurrers therein referred to, and as a statute of amendments it might well be retained as having common application throughout the United States, without impairing any other system of amending pleadings intro-

duced under the act of 1872, adopting the modes of pleading and practice in force in the states. Section 954, by being brought into the Revised Statutes, does not perpetuate nor re-establish the system of special demurrers in states whose statutes have established different and inconsistent rules of pleading. It clearly was not so intended, though the statute of which it was the re-enactment was not repealed by the act of 1872; it had become partly inapplicable to the courts in this state, and so remained since it has been brought forward into the Revised Statutes as an unrepealed law.

The practice under the Code of giving the party the right, as of course, to serve a new pleading after demurrer or answer, is a part of the State system of pleading. It is calculated to relieve the courts from hearing many unnecessary arguments on demurrer, and unnecessary motions, and tends to facilitate the disposition of causes, and is entirely applicable to the courts of the United States. An amended complaint was, therefore, properly served in this case. *Lewis v. Gould*, 13 Bl. C. C. 216; *Bills v. R. Co.* Id. 228; *Beardsley v. Littell*, 14 Id. 102.

2. The amended complaint sets forth the same causes of action as the original complaint. Rev. St. § 4963, referred to in the amended complaint, was a re-enactment, almost without change of language, and certainly without change of sense, of St. 1870, c. 230, § 98, referred to in the original complaint.

It is very true that the last named section was repealed by Rev. St. § 5596, but the later statute being in effect the same law, the error in the original complaint was no more than a mere mistake as to the date of the statute referred to. The case of *U. S. v. Claflin*, 7 Otto, 546, is referred to as an authority that a complaint charging a violation of one statute cannot be amended by changing the averment so that it shall relate to a later statute, because it introduces a new cause of action.

The case has no such point or application. In that case the later statute was held to be a criminal statute, and not one giving a civil remedy, and it was held that no civil action

would lie under the later statute, therefore an amendment would have been impossible if suggested. In the present case the pleader relies upon the same precise facts as in the original complaint. He merely changes the averment as to the statute violated, referring to a later act which was identical with, but passed as a substitute for, the one first referred to. The cause of action was precisely the same.

The motion is denied. The amended complaint is held to have been properly filed, and the defendants' time to answer or demur to it is extended until the expiration of 20 days from the service of this order.

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**RUMSEY v. PHOENIX INSURANCE COMPANY.**

*(Circuit Court, N. D. New York. February 28, 1880.)*

INSURANCE—EQUITABLE OWNER—INSURABLE INTEREST—POLICY.—A vendee in possession, under an executory contract of purchase, is an "unconditional and sole owner of the property," within the terms of a policy of insurance.

SAME—STATEMENT OF INTEREST—LOSS PAYABLE TO LEGAL OWNER "AS HIS INTEREST MAY APPEAR."—An application for insurance by such vendee, without a specific statement of the nature of his interest, is not "an omission to make known every fact material to the risk," within the terms of the policy, where such policy was made payable to the vendor "as his interest may appear."

SAME—LEASE OF PREMISES.—The lease of the insured premises by the vendee did not avoid the policy under the terms of a condition that such policy should be void "if the property be sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree, voluntary transfer or conveyance."

SAME—PROOF OF LOSS—WAIVER OF DEFECTS.—The repudiation of any liability under the policy to the person entitled to demand payment of the same, waives any imperfections in the preliminary proofs of loss.

Motion for new trial.

*G. Wilcoxon*, for complainant.

*E. Newcomb*, for defendant.

WALLACE J. The policy upon which this action was brought insured the dwelling-house of one Zimmer, and the

loss was, by the terms of the policy, payable to the plaintiff, "as his interest may appear."

The policy contains the following conditions: "Any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation or any misrepresentation whatever, either in a written application or otherwise, or if the property be sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree, voluntary transfer, or conveyance; or if the assured is not the unconditional and sole owner of the property, or if the interest of the assured in the property whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise, is not truly stated in this policy, then and in every such case this policy shall be void."

After the policy was issued, and before the loss, Zimmer failed to make payments according to his contract with plaintiff, and moved out of the dwelling. The dwelling was thereafter occupied by tenants. The question of fact was submitted to the jury, whether Zimmer had surrendered or abandoned his contract to the plaintiff, with instructions that if there had been such surrender or abandonment the plaintiff could not recover. The jury found there had been no surrender or abandonment, and, by implication, that the tenants who occupied the premises were Zimmer's tenants. A verdict having been found for the plaintiff the defendant now moves for a new trial.

It is insisted for the defendant that the policy is void, because Zimmer was simply a vendee, in possession of the premises under an executory contract to purchase of the plaintiff, when the policy issued, and therefore "not the unconditional and sole owner of the property," within the conditions of the policy. It is also insisted that because Zimmer stated to defendant's agent, at the time of applying for the insurance, that he "wished his house on Porter street insured," without stating specifically the nature of his interest, there was "an omission to make known every fact material to the risk," within the conditions which render the policy void. These ob-

jections to plaintiff's right to recover may be considered together, and may be disposed of by the answer that Zimmer was the equitable owner of the property, and was the unconditional owner, except as to the plaintiff, and plaintiff's interest was sufficiently indicated by notice that he had such an interest in the premises that the loss would be payable to him.

A party in possession of insured premises under a valid subsisting contract of purchase is the equitable owner, and has an insurable interest, although he has not paid the whole consideration money. He is not guilty of a misrepresentation if he represents the house as *his* when he applies for insurance, and there is no breach of warranty if the house is described as his dwelling-house in the policy. The statement and the state of facts are consistent with each other. There is no misrepresentation, because an intent to deceive cannot be inferred. There is no breach of warranty, because the representation is true in substance. *Strong v. Manfrs. Ins. Co.* 10 Pick. 40; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; *Davis v. Quincy Mutual Fire Ins. Co.* 10 Allen, 113; *Niblo v. North American Ins. Co.* 1 Sandf. 551; *Laidlow v. Liverpool, etc., Ins. Co.* 13 Grant Ch. 377.

It was not incumbent upon Zimmer to make a fuller disclosure of his interest in the premises when he applied for insurance. His failure to do so was not an "omission to make known a fact material to the risk," within the meaning of the policy. This clause in the policy is to be read with the other clauses of which it forms part, and, applying the maxim "*noscitur a sociis*," the word *omission* is equivalent to concealment, in the contemplation of the policy. The cases cited are authorities to the effect that in view of Zimmer's interest as equitable owner of the premises, in the absence of specific inquiry, he communicated all that was material to the risk, and was not bound to specify the precise extent or nature of his interest.

The fact that Zimmer moved out of the dwelling-house and let it to tenants, is not a defence within the condition that avoids the policy, "if any change take place in title or pos-

session." The change of possession contemplated is something more than a change of occupation. It is a change effected "by legal process, judicial decree, voluntary transfer, or conveyance;" one which refers to his possessory right and not to the occupancy of the insured. The possession of Zimmer's tenants was his possession, within the meaning of the policy.

Finally, it is insisted for defendant that plaintiff should be defeated because the proofs of loss were made and verified by him and not by Zimmer; and, inasmuch as the policy requires the proofs to be made by the insured a condition precedent to a cause of action on the policy, has not been complied with. It is a sufficient answer to this position that the defendant received and retained the proofs of loss served by the plaintiff, at the same time repudiating all liability upon the policy, upon the ground that Zimmer had no interest in the premises at the time of the fire. The plaintiff was the person to whom the whole loss was payable, by the terms of the policy, and the proper party to bring an action to recover it. By repudiating any liability under the policy to the person entitled to demand payment the defendant waived any imperfections in the preliminary proofs. Angell on Insurance, § 244.

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### CLARIDGE v. KULMER and others.

(Circuit Court, E. D. Pennsylvania. March 9, 1880.)

**BANKRUPTCY—PREFERENCE—REASONABLE CAUSE TO BELIEVE.**—A preference may be avoided under the bankrupt law wherever the creditor has knowledge of facts calculated not merely to raise a suspicion, but to produce a reasonable belief of the debtor's insolvency. What facts are necessary to produce such belief must be determined in each particular case.

**SAME—SETTING ASIDE EXECUTION—EFFECT ON INTERMEDIATE LIENS.**—Where an assignee in bankruptcy avoids, as a preference, an execution larger in amount than the value of the goods levied on, he is entitled to the goods or their proceeds as against an execution levied after the preferential execution, but before the filing of the petition in bankruptcy.

Bill in equity, filed by petitioning creditors of Dempster, an alleged bankrupt, to restrain certain other creditors from proceeding upon executions levied upon the personal property of the bankrupt, the bill alleging that these executions were fraudulent preferences. An injunction was granted, and, after Dempster had been adjudicated a bankrupt, the property was sold under an order of court by commissioners and the proceeds paid into the registry of the court. The assignee in bankruptcy was substituted as complainant, and after the pleadings and evidence had been completed the cause was, by agreement of the parties, referred to the register in bankruptcy, Edwin T. Chase, Esq., as master. He found the following facts:

The petition in bankruptcy was filed May 14, 1878. On May 8, 1878, two executions had been levied upon the bankrupt's personal property; one in favor of Thompson & Binns, upon a judgment confessed April 26, 1878, for \$806.20, and the other in favor of Gottlieb Kulmer, upon a judgment confessed April 29, 1878, for \$354.81. Between the date of these executions and the filing of the petition several small executions, upon judgments obtained adversely, were levied. Prior to receiving from Dempster the confessions of judgment, Thompson & Binns had from time to time sold merchandise to him for cash, receiving his checks in payment. On the last few purchases the checks came back unpaid and protested. Mr. Thompson, becoming alarmed, went to Chester, where Dempster resided. Both parties went together to the office of Mr. Dickinson, attorney for Thompson & Binns, and Dempster executed the judgment note, which was made payable at once. Dempster told Thompson that he was about being sued, or expected to be sued, for some accounts. Thompson testified that, being afraid that Dempster would confess judgment to his father or some one else, he (Thompson) took the judgment note in order to get ahead of any such judgment, and instructed his attorney to issue execution as soon as suits were brought or judgment obtained against Dempster. Subsequently a judgment was entered in favor of Dempster's

father, and the attorney for Thompson & Binns immediately issued execution on their judgment.

The master further reported that the confession of judgment to Kulmer was for goods previously purchased, at different times, by Dempster, who had given checks for these purchases. The last two checks having been returned protested, Kulmer went to Chester, saw Mr. Washabaugh, his attorney, and was informed by the latter that Dempster was in an embarrassed condition; that many of his checks and drafts had been protested lately, and that he had been undergoing a crisis in his business affairs, but, if allowed an opportunity, would pay the claim. On behalf of Kulmer, Washabaugh then obtained the judgment note from Dempster, upon the understanding that it was to remain in Washabaugh's hands so long as \$50 a week were paid. At this time Washabaugh knew that Dempster had been frequently sued, and that about a week previous judgments had been obtained and executions issued against him for about \$1,400, which, however, had been paid.

The master also reported that it was true that Dempster made statements to Mr. Thompson and Mr. Kulmer, asserting his solvency, but that these statements should not have deceived them, as Mr. Thompson was perfectly competent to form an opinion as to the value of Dempster's stock, and Mr. Kulmer's counsel had full knowledge of Dempster's embarrassed condition.

The master was of opinion that the testimony showed that these execution creditors had reasonable cause to believe Dempster insolvent when they procured the judgment notes from him, (citing *Dutcher v. Wright*, 4 Otto, 557,) and further said: "Counsel for these execution creditors seemed to rely upon the recent case of *Grant v. The Bank*, 7 Otto, 80, as relaxing the rule as to preferences and knowledge on the part of the creditor of the insolvency of the debtor at the time of taking a security, and argued that the decision in that case overruled the leading cases on the subject cited by counsel for the assignee in bankruptcy; but upon a careful examination



of the case referred to the master is unable to see its application to the present case."

With regard to the executions which were issued between the date of the Thompson & Binns and Kulmer executions and the filing of the petition in bankruptcy the master reported as follows: "It was argued by counsel for the several adverse executions heretofore referred to that if it should be held that the executions of Kulmer and Thompson & Binns were void under the bankrupt law these later executions should be paid out of the fund in preference to the assignee in bankruptcy. A number of cases were cited by counsel for and against the proposition. *In re Steel*, 16 N. B. R. 105, and *In re Biesenthal*, 15 N. B. R. 228, were relied upon by counsel for the assignee; and *Stover v. Haynes*, 18 N. B. R. 354; *Shelley v. Elliston*, 18 N. B. R. 375; *In re Hull*, 18 N. B. R. 4, and *In re Gold Mountain Mining Co.* 15 N. B. R. 545, by the counsel for the adverse creditors. These authorities are somewhat conflicting, but in the opinion of the master the question should be determined by the amount of the preferred execution and the value of the property levied upon. The aggregate amount of the Kulmer and Thompson & Binns executions were nearly \$1,200, while the value of the goods levied on \* \* \* was about \$900. \* \* \* Although the last executions were not in fraud of the bankrupt law, it is not the province of that law to put such creditors in a better condition than they would have occupied if such law had not existed, or been invoked; and, as they would have taken nothing if the first two executions had remained unimpeached, it cannot be that they should be paid out of a fund realized from the sale of property which, when levied upon by the later executions, was more than absorbed by the prior executions."

For these reasons the master reported that the fund in the registry of the court should be paid to the assignee in bankruptcy. The cause was heard upon exceptions to this report.

*Joseph J. Broadhurst*, for assignee.

*George L. Crawford*, for Thompson & Binns.

*E. Cooper Shapley*, for Kulmer.

*Alfred Driver*, for subsequent execution creditors.

BUTLER, J. An earnest argument was made against the master's finding that the execution creditors, Gottlieb Kulmer and Thompson & Binns, had reasonable cause to believe Mr. Dempster insolvent when the judgment notes were given. It has not convinced us, however, that the master is wrong.

The law is well settled. *Grant v. The Bank*, 7 Otto, 80, contains nothing new. The creditor must have such knowledge of facts, to defeat a preference, as are calculated to produce reasonable belief of the debtor's insolvency. It is not sufficient that he have cause to suspect, simply. As is said in *Grant v. The Bank*, dicta to the contrary are not wanting. But the rule, as above stated, conforms to the language of the statute, and to every decision in which the question was involved. What facts are necessary to produce the belief must be determined in each particular case. No rule on the subject has been or can be established. To some minds the facts found, and adverted to by the judge, in *Grant v. The Bank*, would have been sufficient, and, if they had satisfied the circuit court, it is quite probable the final result in that case would have been otherwise.

In the case before us it would be difficult, we think, for an unbiased mind to read the testimony respecting the information possessed by Messrs. Kulmer, and Thompson & Binns, at the time their notes were given, and avoid the conclusion that each of them, directly, or through their counsel, had knowledge calculated to produce a reasonable belief that Mr. Dempster was unable to meet his business obligations as they matured. And this inability constituted insolvency. What they may have supposed him able to do with time to nurse his affairs is unimportant. To each of them he had recently given checks repeatedly, without having funds to meet them. They knew that his creditors were pressing; that he was frequently sued, and was seriously embarrassed, Mr. Dickinson, attorney for Thompson & Binns, testifying that a "multitude of suits" had been instituted against him, "several during the previous week," and that he (the witness) was afraid the father would get judgment and sweep everything away. It is not very important that Mr. Dempster was able to arrange

these suits. The fact remains that he was not able to meet his obligations as they matured, and that Kulmer and Thompson & Binns knew it. He was staggering on, under the burden of his debts, endeavoring to procure time, and hoping to get through, but he was manifestly insolvent, and must have so appeared to all familiar with the facts referred to. His representations made to creditors, under the circumstances, were entitled to little credit, and receive little. Neither Messrs. Kulmer, nor Thompson & Binns, believed that "he had abundant means to pay all his debts," if then pushed; otherwise they would not have threatened suit, and pressed for judgments as they did. The exceptions filed by these creditors must therefore be dismissed.

We also agree with the master respecting the claims of the subsequent execution creditors. Without the intervention of the assignee, it is clear, they could get nothing. The benefit of the intervention is for the general creditors. If it were not, the assignee should withdraw; and, if he did not, the court should dismiss his bill. Why should he interfere, at the expense of the state, to confer preference on these subsequent executions? And why should equity aid him in doing so, if he desired? In the distribution these executions will receive a dividend; to give them more would be most unjust. The levy made subject to the prior executions was of no value. It would not have realized a farthing. In principle the claims of these creditors cannot be distinguished from that made in *Reed v. McIntyre*, 8 Otto, 513.

A decree must be prepared dismissing all the exceptions, and confirming the report.

## IN THE MATTER OF HENRY TROTH, Bankrupt.

(Circuit Court, D. New Jersey. January 31, 1880.)

**ASSIGNMENT FOR BENEFIT OF CREDITORS—"CONVEYANCE IN VIOLATION OF THE PROVISIONS OF THE BANKRUPT ACT"—REV. ST. § 5129.**—A voluntary assignment for the benefit of creditors, under a law of the state of New Jersey, which "imposes restraints upon the rights to participate in the distribution of the assigned estate," inconsistent with the bankrupt act, and changing "the course of their administration" under the act, is a "conveyance in violation of the provisions of the bankrupt act," within the scope of section 5129 of the Revised Statutes.

**SAME—DEBTS PROVED UNDER ASSIGNMENT—COMPOSITION RESOLUTION.**—Creditors who have proved their debts under such assignment are still competent to vote upon a composition resolution at any time within six months after such assignment was made.

**Bill of Review.**

**McKENNAN, J.** This bill prays for a reversal of the order of the district court approving a resolution of composition adopted by the creditors of Henry Troth, and ordering it to be recorded.

It appears that on the thirtieth of August, 1878, Henry Troth filed his petition in bankruptcy, and that on the twenty-first of October following, at a meeting of his alleged creditors, a resolution of composition was adopted by the required number of creditors, representing the required amount of claims against the bankrupt.

On the tenth of April, 1878, the bankrupt made a voluntary assignment of all his property for the benefit of his creditors, under which all the creditors, who approved of the composition, proved their debts, and made claim to their dividend of the assigned assets. The complainant, on this proceeding, refused to prove under the assignment or to assent to the composition.

Hence it is urged that the resolution of composition was not lawfully adopted, and ought not to have been approved by the district court.

By the statute of New Jersey relating to voluntary assignments, the assignee is invested with a complete title to all the property of the assignor at the date of the assignment,

which property he holds for the benefit only of those creditors who prove their debts within a fixed period, their right to participate in the distribution of it thereby becoming vested. All other creditors are excluded from any share of the assigned estate, but their rights are not otherwise affected.

By the plain terms of the statute, as well as by repeated judicial exposition of it, the participating creditors are barred of any suit, in law or equity, against the assignee, except in respect of the property upon which the assignment operates. He is protected against personal liability to them, his future acquisitions are unavailable to them, and in every beneficial and practical sense the relation of debtor and creditor between them ceases to exist. It follows, therefore, that if the title of the voluntary assignee to the property conveyed by the assignment is indefeasible by the assignee in bankruptcy, the creditors who proved their claims under the assignment could not pass a valid resolution of composition.

This depends upon the effect of the thirty-fifth section of the original bankrupt act, which has been divided into sections 5128 and 5129, in the Revised Statutes.

The first of these sections (5128) avoids preferences to creditors, when made within *four* months before the date of proceedings in bankruptcy; and the latter (5129) avoids all conveyances made in violation of the provisions of the bankrupt act within *six* months of the date of such proceedings.

It is only necessary to say, in reference to the act of June 22, 1874, that it is inoperative in this case. Its abbreviation of the period within which preferences and conveyances in violation of the bankrupt law may be avoided is expressly limited to cases of involuntary bankruptcy, leaving the original enactment unchanged in all cases of voluntary bankruptcy.

I think there is no reason to doubt that the voluntary assignment here does not fall within the class of preferences to which section 5128 of the Revised Statutes exclusively applies, and which are avoidable when made within *four* months before the date of proceedings in bankruptcy. By the terms of the state law under which it was made all the property of the assignor vests in his assignee for the equal benefit

of all his creditors, and the right of all the creditors to participate in it, without discriminating conditions, is recognized and secured. But, inasmuch as the state law imposes restraints upon the right to participate in the distribution of the assigned estate which are inconsistent with the bankrupt act, and so changes the course of their administration under the latter act, it is a "conveyance in violation of the provisions of the bankrupt act," and is thus brought within the scope of section 5129. For the avoidance of such conveyances six months are allowed by that statute.

This classification of the assignment in question is sustained by the opinion of the supreme court in *Mayer v. Hillman*, 1 Otto, 496. In that case it was held that a voluntary assignment, under the laws of Ohio, for the equal and common benefit of all the creditors of the assignor, is not fraudulent, and if voidable it must be because it may be deemed necessary for the efficiency of the bankrupt act that the administration of an insolvent's estate shall be entrusted to the direction of the district court, and not left under the control of the appointee of the insolvent, and hence that proceedings to avoid such an instrument may be commenced within *six* months. And such is the import of other decisions of the same court.

As the proceedings in bankruptcy in this case were begun within *six* months after the date of the voluntary assignment, that instrument was not then indefeasible, but might have been declared invalid at the instance of an assignee in bankruptcy. The creditors who proved their debts under the voluntary assignment, therefore, still sustained that relation to the bankrupt, and were competent to vote upon a composition resolution. As that resolution was lawfully adopted, it was properly approved by the district court, and the bill must, therefore, be dismissed, with costs.

## BABCOCK v. JUDD and another.

*(Circuit Court, D. Connecticut. February 23, 1880.)*

**PATENT—NEW COMBINATION OF OLD INGREDIENTS—SUBSTITUTION OF NEW INGREDIENT—GILL v. WELLS, 21 Wall. 1.**—The substitution of a new ingredient in a patented combination of old ingredients does not constitute an infringement.

Bill in Equity for alleged infringement of letters patent.

*Charles E. Gross*, for plaintiff.

*Charles E. Mitchell*, for defendants.

SHIPMAN, J. This is a bill in equity founded upon the alleged infringement of letters patent for an improved window-spring catch, or sash-holder, which were issued to Franklin Babcock on September 29, 1868. The plaintiffs are the owners of the patent.

The patented device consists of a cylindrical shell or socket, having a screw cut upon its outer periphery, into which socket is inserted, through an opening in the outer end, a sliding bolt. The bolt consists of a slender stem within the socket, and a sliding shoulder and thumb flange, which are exterior to the socket. Around the stem is a spiral spring, acting between the bottom of the socket and the sliding shoulder. The stem passes through a hole in the bottom of the socket, and is riveted at the end so as to limit outward movement. The hole acts as a necessary bearing for the stem, which is of small diameter as compared with the shell.

By means of the thumb flange the sliding bolt is pressed back against the spring. The whole is adapted to be screwed into the jamb of a window-frame, so that the thumb latch shall extend outward in front of the sash, and the angle of the bolt shall be so placed that it can enter into notches in the side of the sash to hold the window, and can be released by pressing back the bolt by means of the thumb flange.

The invention consisted merely in the combination of the different elements, all of which were old. The same form of bolt was manufactured many years ago in New Britain. The claim is for "the combination of the screw socket A, sliding

shoulder B, with flange C, stem *a*, and spring *b*, all as and for the purpose set forth."

The plaintiffs endeavor to have the claim construed to mean the combination of screw socket, a sliding bolt provided with a thumb pad and stem, and the spring, so that a sliding bolt, if provided with a thumb pad and a stem or leg of any sort, would be included within the patent. This is not the obvious meaning of the claim or of the specification. The specification describes the stem with more particularity than the patentee used in regard to the other parts of the combination. Indeed, but little description of the elements of the device was necessary or was given, as the different parts were well known, and were clearly shown in the drawings. The patentee intended to claim the combination of screw socket, sliding shoulder with flange, stem *a*, (the last two elements constituting a well-known form of bolt,) and the spring. The stem is made, in the patent, as important a member of the combination as any other.

This combination was novel and useful. It is admitted that the defendants have infringed the patent by the manufacture and sale of articles like Exhibit 4, which are the plaintiff's catch with a double stem.

The defendants have also made and sold articles which were known upon the trial as Exhibit 5. The question in the case is whether the form of sash-holder is an infringement.

The catch consists of a cylindrical screw socket, the bottom of the socket having no hole. The bolt has the plaintiff's sliding shoulder and thumb pad, but the defendants have, with a good deal of ingenuity, made a somewhat clumsy new hub or stem in place of stem A. Instead of the slender, round stem, whose diameter is no larger than the thickness of the shoulder, the diameter of the defendants' hub is greater than the thickness of the bottom of the bolt, whereby two shoulders are formed at the junction of the body and hub, which shoulders enlarge the bolt at that point so that movement outward or toward the window is limited. The hub has a socket to receive the spring, and its inner end has four radial arms or prongs, which extend outward far enough to span substan-



tially the inner chamber of the socket. These arms bear upon the inner walls of the socket; the shoulders at the other end of the hub bear also upon the side walls, so that the bolt is supported at each end, and is moved endwise with the case on these supports. The bottom of the shell forms an abutment to the spring, as in the plaintiff's catch.

The enlarged shoulders and radical arms prevent the bolt from being inserted in the case through its outer end. The case is left open at the inner end and the bolt is there inserted, the arm, upon which is the thumb pad, being bent over so as to bring its outer end substantially in front of the opposite end of the bolt. After the thumb pad has passed through the orifice in the outer end of the case, the bolt is turned one-quarter revolution, and is also passed through the orifice until it is stopped by the shoulders. The spring is then placed in the socket of the hub and the bottom of the case is placed in position.

This form of bolt was new at the date of the Babcock patent. It is not the Converse bolt, known as Exhibit 9, which, although it has the spring receiving socket in the hub, is differently constructed with respect to the sides of the hub, and to the position of the sliding shoulder. Had the defendants' bolt been known at the date of the patent, the general functions of the two bolts being the same, the substitution would have been simply a substitution of one well-known bolt for another, which performed the same office, and the change would have been formal. But the stem of the bolt is new, and while the general window locking function of the two bolts is the same, the change in the method of construction is not merely formal, but is a change in the principle upon which the stem is made. The plaintiff's stem had its bearing in the hole in the bottom of the case. This compelled the stem to protrude through the bottom of the case when the bolt was pressed inwards. The defendants' stem has its bearings entirely upon the walls of the case, which therefore is wholly closed except in front. Whether this is an advantage or not, I do not know. In consequence of the bolts coming in direct contact with the bottom of the case

less pressure may be brought to bear upon the defendants' spring than upon the plaintiff's, and it may be less liable to injury.

The law upon the subject of equivalents for one of the members of a combination of old ingredients has been frequently laid down of late by the supreme court. It is stated in *Gill v. Wells*, 22 Wall. 1, as follows: "By an equivalent in such a case it is meant that the ingredient substituted for the one withdrawn performs the same function as the other, and that it was well known, at the date of the patent securing the invention, as a proper substitute for the one omitted in the patented combination. Hence it follows that a party who merely substitutes another old ingredient for one of the ingredients of a patented combination is an infringer, if the substitute performs the same function as the ingredient for which it was substituted, and was well known at the date of the patent as a proper substitute for the missing ingredient. But the rule is otherwise if the ingredient substituted was a new one, or performed substantially a different function, or was not known at the date of the plaintiff's patent as a proper substitute for the one omitted, as in that event he does not infringe."

There must be a decree for an injunction, and for an accounting in regard to all articles made like Exhibit 4, with costs.

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THE THATCHER HEATING COMPANY v. SPEAR and another.

(Circuit Court, S. D. New York. January 28, 1880.)

PATENT—IMPROVEMENTS IN AIR-HEATING FURNACES.

Infringement of Patent.

B. F. Lee, for plaintiff.

E. Cowen, for defendants.

BLATCHFORD, J. This suit is founded on letters patent No. 71,244, granted to John M. Thatcher, November 19, 1867, for an "air-heating furnace." The specification states that

the invention is one of "improvements in air-heating furnaces." The right figures in the drawings are all of them views of different parts of a furnace. The specification says: "My said invention consists of several improvements in hot-air furnaces designed to be set in brick-work or inclosed in any suitable manner."

The specification then divides the invention into six parts. The first part consists of one particular; the second part of three particulars; the third part of one particular; the fourth part of two particulars; the fifth part of one particular; and the sixth part of one particular. There are as many claims as there are particulars, namely, nine. Only the second and third claims are involved in this suit. They relate to particulars 1 and 2 of the second part of the invention.

The text of the specification says, in respect to those particulars: "My invention also consists in the combination and arrangement of a passage way from and through the furnace front to and into the fire-pot at the bottom thereof, the passage way being of sufficient width and height to admit of the introduction of a slicer or poker for the purpose of slicing the fire and removing the clinkers from the grate-bars forward; the bottom of the passage way being on a line with the top surface of the grate bars, and the top and sides of the passage way being formed by an enclosing plate, extending from the fire-pot to the furnace front, and joining at the sides the ash pit box, so as to prevent any communication between said passage way leading from the furnace front into the fire-pot and the hot-air chamber surrounding the fire-pot; and this part of my invention further consists in combining with said enclosed passage from the furnace front to the fire-pot a downward opening between the furnace front and fire-pot, leading from said enclosed passage to the ash pit, whereby clinkers and other matter removed from the fire-pot may fall into the ash pit."

The specification also says: "The drawings illustrate a furnace for brick-work, in which my inventions are embodied. The fire-pot *a* is a cylindrical casting, such as commonly used for that purpose, and sets upon a box, also of cast-iron, which

encloses the ash pit *b*. \* \* \* The fire-pot is placed at sufficient distance from the furnace front *e* to allow the hot-air chamber enclosed in the inner surrounding walls to extend around the fire-pot, between it and the furnace front. \* \*

\* At the bottom of the fire-pot, in the front part thereof, is a clinker cleaning aperture *i*, which extends forward to and through the furnace front, the passage way being enclosed by the plate *i*, so that it shall not have any communication with the surrounding hot-air chamber *e'*. A stopper may be used to close this clinker cleaning passage, or that part of it which leads into the fire-pot, if desired, or it may be left open to supply air to the fuel in the fire-pot. The aperture should be of sufficient width and height to permit the introduction and use of a slicer, or a poker, or other suitable instrument, for the purpose of slicing the fire, cleaning the grate-bars from clinker, and removing the clinker, which may be drawn out through this passage into the room in front of the furnace front, if desired, when the downward passage *j* is not used, in which case there should be a plate across the space between the fire-pot and furnace front, on a level with the top surface of the grate-bars. The downward passage *j*, between the furnace front and grate, is an opening leading from the clinker cleaning passage down to the ash pit, for the purpose of allowing the clinker and ashes to fall from the clinker cleaning opening into the ash pit."

The second and third claims are in these words: "2. The clinker cleaning passage from and through the furnace front to and into the fire-pot, enclosed by the plate connected with the fire-pot, furnace front and ash pit, so as to prevent communication with the hot-air chamber surrounding the fire-pot, substantially so described. 3. In combination with the clinker cleaning passage, the downward passage leading therefrom to the ash pit, substantially as described."

Various prior structures and patents are set up as anticipating the second and third claims on the question of novelty. One is the furnace represented by the defendants' exhibit—"O'd Philadelphia Heater." It is adduced to defeat the second claim. On the whole evidence it did not contain a prac-

tically useful clinker cleaning passage, nor one operating as Thatcher's does. The passage was so narrow at its inner end, in proportion to the diameter of the grate, as to require all the clinkers on the grate surface which could be reached to be drawn to such narrow aperture, and thus a large part of the clinkers which could be reached would be drawn through, and carry along with them the live coals remaining in the parts previously cleaned of clinkers. This difficulty is obviated in Thatcher's arrangement by the relation which the size of the inner end of the passage bears to the size of the grate. Moreover, in the "Old Philadelphia Heater" the sides of the fire-pot were nearly at right angles to the opening, and this made it impossible to reach considerable portions of the grate surface. The structure had no downward passage.

The Spear car-heater does not contain Thatcher's inventions.

The John P. Hayes patent, of June 22, 1858, is adduced. The upwardly projecting studs on the grate prevented Hayes' arrangement from operating like Thatcher's, and there was no downward passage leading out of a clinker cleaning passage. The same remarks apply to "defendants' exhibit, J. P. Hayes' heater," and to "complainant's exhibit, New Jersey representation of Hayes' heater."

The Moore patent of May 22, 1866, has no bearing on the case.

The patent to James Morrison, Jr., of February 21, 1865, is for a stove, not a furnace. The stove has near its base an opening from the outside, on a level with the grate, to and into the fire-pot, for the purpose of raking out the clinkers and dropping them into the ash pit over the edge of a projection from the grate. The clinker cleaning passage does not extend through a chamber containing hot air, as in Thatcher's arrangement. Nor is the downward passage wholly within the clinker cleaning passage, as in Thatcher's structure, but, on the contrary, it is wholly outside of the clinker cleaning passage. The Morrison model, if differing from the description and drawings of the patent, cannot be regarded to affect Thatcher's patent. The Thatcher patent requires that the

clinker cleaning passage shall be enclosed by a plate connected with the fire-pot, furnace front and ash pit, which shall prevent communication with a hot-air chamber surrounding the fire-pot, and that the downward passage shall be wholly between the furnace front and the grate, and none of it outside of the furnace front. No such arrangement is found in Morrison's structure.

The material question is that of infringement. In the defendants' structures, represented by the plaintiff's exhibits D, E, F, G, H and I, and which are represented, also, in substance, by the defendants' model, "Anti-clinker Heater," the anti-clinker arrangement for cleaning the grate is placed wholly below the hot-air chamber, and below the bottom of the fire-pot and within the ash pit. The clinker cleaning passage does not go through the hot-air chamber. In the Thatcher arrangement the clinker cleaning passage is above the ash pit and goes through the hot-air chamber. As the defendants do not have the clinker cleaning passage of the second claim of the Thatcher patent, they do not have the clinker cleaning passage of the third claim, and so neither claim is infringed.

Nor do the exhibits K and L and Angus' stove infringe either the second or the third claim. They do not have any hot-air chamber surrounding the fire-pot, and so do not infringe the second claim. They do not have the clinker cleaning passage of the third claim, because they do not have the clinker cleaning passage of the second claim, enclosed by the plate of the second claim, shutting off communication with a hot-air chamber surrounding the fire-pot.

The bill is dismissed, with costs.

## STEPHENSON v. THE SECOND AVENUE RAILROAD COMPANY.

(Circuit Court, S. D. New York. January 20, 1880.)

## PATENT—RE-ISSUE—IDENTITY OF INVENTION.

## Infringement of Patent.

WHEELER, J. The only real question presented at the hearing of this cause upon the pleadings as drawn, under the law, and the evidence admissible in support of them, is whether the re-issued patent No. 6,697, dated October 11, 1875, is for the same invention as that for which the original patent No. 61,482, dated January 22, 1867, was granted. Upon a careful examination of each, although there are several things mentioned and described in the specification of the re-issue not mentioned or described in that of the original, and although the claims are quite different, there is nothing mentioned or described in the specification of the re-issue not shown in the drawings or model of the original, so far as has been observed, and there is no element of any combination, or arrangement, or device, claimed in the re-issue that is not either mentioned or described in the original as performing, or intended to perform, the office assigned to it in the reissue. Therefore, it cannot be held that the re-issue is for any different invention from that described in the original.

Let a decree be entered for the orator for an injunction against further infringement of any of the patents described in the bill except No. 1,959, dated June 14, 1864, for a design, which has expired, and for an account according to the prayer of the bill, with costs.

## COMMERFORD v. THOMPSON.

(Circuit Court, D. Kentucky. March 31, 1880.)

LETTERS CONCERNING LOTTERIES—LETTERS ADDRESSED TO SECRETARY OF LOTTERY COMPANY—DETENTION BY POSTMISTRESS—INJUNCTION.—

A court of equity will not grant relief where letters addressed to the secretary of a lottery company are detained by the postmistress, under the direction of the postmaster general, as having been mailed in violation of section 3894 of the Revised Statutes, providing that "no letter \* \* \* concerning lotteries \* \* \* shall be carried in the mail," where the pleadings fail to show that the letters had no connection with the lottery business.

In Equity.

*James A. Beattie, D. W. Sanders and W. O. Dodd*, for complainant.

*G. C. Wharton, J. R. Goodloe and A. A. Freeman* for defendant.

BROWN, J. This is a bill brought by the complainant, a citizen of New York, against the defendant, postmistress of the city of Louisville, for the purpose of enjoining her from interfering with and delaying complainant's letters, addressed to him at Louisville. The bill charges, upon information and belief, that there are in the post-offices, and have been since the tenth of October, letters of the value of \$5,500, addressed to "T. J. Commerford, Secretary, Louisville, Kentucky, lock-box No. 121," with the required postage prepaid upon each letter, and that defendant has taken possession of the same, and refuses to deliver them as the laws of the United States require, notwithstanding he has demanded possession thereof. The bill further alleges that at the time these letters were mailed the postal laws of the United States and the regulations of the department authorized the mailing and transmission thereof and their delivery by the defendant; that the complainant is entitled to possession of the same, and unless they are delivered he will suffer great wrong and irreparable injury.

Prayer for an injunction to the defendant to deliver possession, v.1, no.7—27



sion of any and all letters addressed to the complainant, as well as all such as may hereafter be addressed to him and received at her office.

In her answer defendant bases her refusal upon certain instructions from the postmaster general, directing the detention of letters addresssed to the complainant. She denies that the laws of the United States, or the regulations of the department, require the delivery of such letters, and charges, upon information and belief, that all of said letters are letters and communications about and concerning a lottery known as "The Commonwealth Distribution Company;" that all of said letters are intended to be received by said company, although addressed in the name of the complainant, "Secretary," for convenience, and to conceal the fact that they were intended for said company, and that they were letters and communications concerning a lottery; that they are the exclusive property of said company, and that the complainant is but the secretary so-called, and employe of said company, and has no ownership or property in said letters; and that said letters, and every one of them, were deposited in the mail bag of the United States in violation of the laws of said government, and that their transmission from the various offices where they were deposited was also in violation of the law.

The answer further sets forth the correspondence with the postmaster general in which he directed defendant to detain letters to "T. J. Commerford, Secretary," and insists such order was justified by law, and was within the scope of his powers as postmaster general.

Few intelligent persons will deny that lottery gambling is a vice which merits the reprobation visited upon it by almost all the enlightened legislatures of modern times. The moral sense of the community long since pronounced against it, and the eloquent denunciations of Mr. Justice Catron, in the case of *The State v. Smith*, 2 Yerg. 272, will touch a responsive chord in the heart of every honest man.

The recent report of the postmaster general to the house of representatives sets forth with startling emphasis the

systematic deception and often deliberate swindling practiced by the promoters of these and kindred enterprises, and his efforts to purge his department of all complicity in their doings challenges the approval of public opinion.

At the same time courts are bound to administer the law as they find it, and are often powerless to remedy evils, the existence of which is fully admitted. The toleration or inhibition of lotteries is a matter exclusively within the control of the several states, and congress can do no more than to deny them the use of the national mails for the propagation of their schemes.

But while there is, undoubtedly, power to prescribe what shall or what shall not be carried by post, (*ex parte Jackson*, 96 U. S. 727-732,) the mails are, *prima facie*, intended for the service of every person desiring to use them; and a monopoly of this species of commerce is secured to the post-office department. Rev. St. § 3982. It is, then, scarcely necessary to say that the officers of the department are the agents of the public in the performance of this service, and that no postmaster, whether acting under the instructions of the postmaster general or not, can lawfully refuse to deliver letters addressed to his office, unless special authority for so doing is found in some act of congress. Indeed, the unlawful detention of letters by a postmaster is denounced by sections 3890 and 3891, and a violation of his duty to deliver mail matter is made punishable by fine and imprisonment.

Authority for the detention of the complainant's letters by the defendant in this case is claimed to exist under the following section of the Revised Statutes:

"Section 3894. No letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punishable by a fine of not more than \$500, nor less than \$100, with costs of prosecution."

Counsel for the government have based their whole defence upon the applicability of this section to the case under consideration. Whether it was intended to apply only to mail matter posted in the interest of lottery companies, gift concerts and other similar enterprises, by their managers or agents, for the purpose of attracting custom, or equally to letters addressed to such companies, is the main question in this case. Its solution depends largely upon the construction to be put upon the word "concerning." It is obvious that this word was not intended to be used in its broadest sense, "pertaining to or relative to," as such construction would include every letter of which the enterprises mentioned in the section were wholly or in part the subject, comprising not only letters written in the interest of these enterprises, but letters of inquiry, letters seeking legal advice, letters written for the purpose of suppressing their business, and even the correspondence carried on between the defendant and the general post-office in this case. This certainly was not the intention of congress.

The word "circular," we think, affords a clew to the meaning of this section. This word obviously refers to circulars sent out by lottery companies for the purpose of advertising their schemes, and the word "letter" used in connection with it, under the rule of "*ejusdem generis*," imports letters of a similar character and mailed for a like purpose.

It was evidently the intention of congress to strike at the root of the lottery system by inhibiting to them the use of the mails for the propagation of their schemes, and to fix a penalty for such use; but the imposition of such penalty upon the writers of letters addressed to the promoters of the enterprises mentioned in this section might result in great injustice, as many of these men purport to be engaged in a perfectly legitimate business, "not depending upon chance, but upon accumulated capital, invested, under the advice of men of experience, judgment and integrity, in the actual purchase of stocks in Wall street," and the letters might be written by persons wholly ignorant of the true nature of the enterprise, and with a perfectly innocent intent. The act is not only in

derogation of the common law, but is penal in its character, and should therefore receive a strict construction.

This section was evidently intended for the punishment of the guilty promoters of these impostures, but in other sections congress has provided, not for the punishment, but for the protection of their victims, by requiring registered letters and money orders to be returned to the writers under such regulations as the postmaster general may prescribe. Sections 3929 and 4041. No penalty is in express terms affixed to the senders of these letters, and we think it would be a forced construction of the law to apply the penalties of section 3894 to them. Obviously, sections 3929 and 4041 will not justify the acts of the defendant in this case, as the Commonwealth Distribution Company is not fraudulent, but is apparently legalized by the law of the state, (at least this was assumed upon the argument,) and there is no averment in the answer that the letters are registered or contain money orders. Nor is there any allegation of a compliance by the defendant with the regulations of these sections; indeed, it was admitted upon the argument that the act of the defendant could not be justified unless section 3894 covered the case.

But we think the act of the defendant in detaining these letters was unauthorized for another reason. The act declares certain letters unmailable, but provides no machinery for their arrest and detention, probably because no such machinery is possible, except by resort to the courts, without a violation of the constitutional guarantee of the right of the people to be secure in their papers against unreasonable searches and seizures. *Ex parte Jackson*, 97 U. S. 733. The act simply provides for the imposition of a fine upon the person mailing them. We think this method of enforcing the statute is exclusive, at least of any such remedy as the detention of letters on a mere suspicion, though I would not say that a postmaster might not lawfully refuse to receive letters known to him, by the statements of those mailing letters, or otherwise, to contain unmailable matter.

It is a rule in the construction of statutes that where a new offence is created, and the penalty is prescribed for it, or a

new right is given and a specific relief provided for the violation of such right, the punishment or remedy is confined to that given by the statute. Sedgwick on Statutory Law, 94. In this construction I concur in the opinion of Mr. Attorney General Devens, of April 30, 1878; but conceding that the act of the defendant in detaining these letters was unauthorized, and that the complainant might maintain an action at law for damages, it does not necessarily follow that he is entitled to an injunction. The writ of injunction does not issue as a matter of course, even if the complainant has made out a technical right to relief. An application to the court of chancery for the exercise of its prohibiting powers or restrictive energies must come by the dictates of conscience, and be sanctioned by the clearest principles of justice. The granting of an application is largely a matter of discretion, and is addressed to the conscience of the chancellor, acting in view of all the circumstances connected with the case. A party seeking this extraordinary remedy must come into court with clean hands, and show not only that his claim is valid by a strict letter of the law, but that in justice and equity he is entitled to this particular mode of relief.

In the case of the *Maryland Savings Institution v. Schroder*, 8 Gill & Johnson, 93, the depositor of a sum weekly in a savings institution, which he was entitled to withdraw at pleasure, agreed with and requested the institution to convert and invest his deposits permanently into the stock of said company. Upon the conversion he received dividends and participated in its entire profits. The institution became insolvent, and receiving in the course of its settlement with its debtors its certificates of deposit and payment, which would absorb all available funds of the depositor, on the ground that a conversion of his money into stock was in violation of the charter of the company, he applied for an injunction. It was held that whether the charter authorized it or not he was not entitled to the restraining power of the court. In delivering the opinion the court observed:

"The object of the injunction appears to have been, and its effect and operations are to prevent the officers of the cor-

poration from paying the special depositors, on receiving their certificates of deposit, in the payments of debts due to the institution. How far it is warranted by the principles of equity and conscience in such, its operation upon their right and interests, it is the duty of this court now to examine and declare, and we think that in a court of conscience, at least, but little doubt can be entertained upon the subject. It is an unyielding and inflexible principle of the court of chancery that he who seeks equity ought to be prepared to do equity. Before, therefore, the complainant can enlist the countenance of a court of equity in his favor, he must be prepared to render to these depositors that full measure of justice which the principles of equity and conscience demand at his hands."

It was said in *Bosley v. Johnson* (7 Harris & Johnson, 468) "that there was no case in which a court of equity ever granted a perpetual injunction to a complainant to protect him in the enjoyment of a naked legal right which he or those under whom he claims have stipulated by deed not to exercise."

Legal rights are to be asserted by legal means, and in such cases courts of equity never lend their aid where justice and equity do not imperatively demand it.

In *Kneedler v. Lane*, 3 Grant's Cases, 523, an injunction had been issued against the officers of enrolling boards to restrain them from proceeding further with the drafting of soldiers under the conscription act of March 3, 1863, upon the ground that the act was unconstitutional. In a subsequent argument of the case the decision was overruled and the act pronounced constitutional, but it was further held that, even if the act had been unconstitutional, the court ought not to have granted an injunction.

In delivering the opinion Mr. Justice Strong observed: "I had no doubt then, and I have none now, that these bills do not present a proper case for the interference of a court of equity by an injunction, even if the act of congress were unconstitutional. The facts charged exhibit no case for the intervention of a court of equity. No chancellor ever enjoined

in such a case, and I think it has never before been supposed that he has any jurisdiction over such wrongs, if it be a wrong, as these complainants ask to be restrained. No one has ventured to assert that every civil wrong may be restrained by injunction, and that a judge sitting in equity can enjoin against any act that a common-law court and jury can redress."

In *Edwards v. The Allouez Mining Co.* 38 Mich. 46, an injunction to restrain a corporation from encroaching upon the land of a riparian proprietor, and polluting the stream in front, was denied upon the ground that he had bought the land upon speculation, knowing of the encroachments, and had tried to sell it to the corporation at an exorbitant price. The comments of Mr. Justice Cooley are pertinent in this connection: "Wherever one keeps within the limits of lawful action, he is certainly entitled to the protection of the law, whether his motives are commendable or not; but if he demands more than the strict rules of law can give him, his motives may become important. In general, it must be assumed that the rules of the common law will give adequate redress for any injury; and when the litigant avers that under the circumstances of his particular case they do not, and that, therefore, the gracious ear of equity should incline to hear his complaint, it may not be amiss to inquire how he came to be placed in such circumstances." See, also, *Kerr on Injunctions*, 6; 2 *Story's Equity*, § 959; *Tucker v. Carpenter*, Hamps. 440; *Cassaday v. Cavenor*, 37, Iowa, 300; *Jones v. City of Newark*, 3 Stock. 452; *Cobb v. Smith*, 16 Wis. 661; *Bonaparte v. Camden & Amboy R. Co.* Bald. 218.

Let us apply these principles to the case under consideration. The answer avers, and for the purposes of this case it must be taken as true, that all said letters are letters and communications about and concerning a lottery known as the Commonwealth Distribution Company, and that all said letters are intended to be received by said company, and are its exclusive property. The word "concerning," as used in this answer, must be taken in the sense in which it was intended by the pleader, as meaning that the letters detained belonged

to the distribution company, and related to the business carried on by that company. It is fair to presume that this company is seeking them in furtherance of its business as a lottery; indeed, in the bill, they are expressly averred to be at the value of over \$5,000, and in complainant's brief they are said to contain orders for tickets. Now, congress has placed upon all of this class of enterprises the stamp of its disapproval. It has denounced it by legislation, as far-reaching as its constitutional power permitted, as contrary to public policy. We think that a court of equity ought not to lend its aid directly or indirectly to schemes which congress has thus characterized.

Suppose the defendant had detained letters and circulars mailed by this company, and the complainant had filed the bill, confessing the character of the letters, to enjoin her action upon the ground that the section only imposed a penalty, and did not in terms authorize the detention of letters, we think a court of equity would not hesitate to refuse its aid thus sought for an unlawful purpose. The case under consideration is but one remove from this. In all human probability the letters detained here are written, not only in furtherance of the lottery business, (*Dwight v. Brewster*, 1 Pick. 50,) but are to be answered, and in answering them complainant will be guilty of a violation of the law. Had he replied to the answer, and made it appear that the letters had no connection with the lottery business, he might have been entitled to the protection of a court of equity, but the pleadings fail to show a moral obligation on the part of this court to relieve him. In any light in which this case can be viewed, it is impossible to avoid the conclusion that the court is required to lend its aid to a scheme condemned alike by congress and by public opinion. Complainant should be left to his remedy at law.

**An order will therefore be entered dismissing the bill.**



UNITED STATES *v.* NOELKE.

(Circuit Court, S. D. New York. March 30, 1880.)

**INDICTMENT—REV. ST. § 3894—MAILING A LETTER CONCERNING A LOTTERY—WRITING DESCRIBED AS A “LETTER AND CIRCULAR.”**—A writing is not improperly described as a “Letter and Circular,” in an indictment under section 3894 of the Revised Statutes, providing that “no letter or circular concerning lotteries \* \* \* shall be carried in the mail.”

**SAME—UNNECESSARY ALLEGATION—“CONCERNING A LOTTERY OFFERING PRIZES.”**—It is not necessary to allege that the writing was one “concerning a lottery offering prizes.”

**SAME—INFORMAL AVERMENT—VERDICT—ARREST OF JUDGMENT.**—The informal averment of facts necessary to show the illegal quality of the writing is cured by verdict, and will not sustain a motion in arrest of judgment.

**SAME—UNNECESSARY AVERMENT—LOTTERY IN THE SENSE CONTEMPLATED BY THE STATUTE.**—It is not necessary to allege facts showing that the writing set forth concerned a lottery, “*in the sense contemplated by the statute,*” when it clearly appears upon the face of such writing that it was such a letter as was within the prohibition of the statute.

**SAME—CIRCULAR—ALLEGATIONS IN *HÆC VERBA*.**—A circular alleged to have been mailed in violation of the statute should be set forth *in hæc verba*, and the omission is not cured by verdict.

**TRIAL—JUROR—“PREJUDICE AGAINST THE LOTTERY BUSINESS.”**—A juror is not rendered incompetent, upon the trial of such indictment, by the fact that he has a prejudice against the lottery business or those who are engaged in it, or that he is disposed in his mind to put an end to the traffic in lottery tickets, or that he is in favor of active measures for the suppression of such business.

**EVIDENCE—PAPERS ENCLOSED WITH LETTER—*RES GESTÆ*.**—Papers enclosed in the same envelope with the writing set forth in the indictment, are admissible in evidence as part of the *res gesta*.

**CIRCUMSTANTIAL EVIDENCE—PROOF OF MOTIVE AND OPPORTUNITY TO COMMIT THE OFFENCE.**—Circumstantial evidence is competent which tends to show that the defendant had both motive and opportunity to mail the writing in violation of the statute.

**JUDICIAL DISCRETION—RE-OPENING CASE—PROOF OF LOTTERY.**—It was within the discretion of the judge who presided at the trial to permit the case to be re-opened, in order to permit the prosecution to prove the existence of the lottery, concerning which the papers in question were made.

**STATUTE INCORPORATING LOTTERY—PUBLIC STATUTE—PROOF—STATUTE BOOK.**—The act of the state of Louisiana, (Laws 1868, pp. 24-26,) entitled "An act to increase the revenues of the state, and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force," is a public act, and can be proved by the introduction in evidence of the statute book containing it.

**EVIDENCE—PROOF OF INCORPORATION UNDER STATUTE.**—It was not necessary for the government to prove that the lottery was organized under the Louisiana statute, or that the parties who issued certain lottery tickets enclosed in the same envelope with the letter, purporting to be issued by the Louisiana State Lottery, were a corporation, as they purported to be.

**SAME—PROOF OF LOTTERY.**—The evidence of the Louisiana statute, and of the sale of the lottery tickets contained in the mailed envelope, were sufficient to establish the existence of the lottery, in the absence of any evidence to the contrary.

**SAME—PROOF THAT LETTER RELATED TO A LOTTERY.**—The surrounding circumstances, and the occupation of the defendant, were admissible in evidence in order to prove that the letter and circular related to a lottery.

**SAME—PROOF THAT DEFENDANT UNLAWFULLY MAILED THE LETTER.**—Where it was undisputed that the defendant was engaged in the lottery business, evidence that defendant received an order for two lottery tickets such as were subsequently mailed with the letter; that the name used in the address of the letter was the same as that signed to the order; that the tickets bore his stamp, and that the letter enclosed his business card, would justify the conclusion that the defendant deposited the letter in the post-office for mailing.

**SAME—POST-OFFICE STAMP—PROOF THAT LETTER WAS MAILED.**—The post-office stamp upon the envelope is *prima facie* proof that the letter was mailed, although it be shown that, in aid of justice, postmasters sometimes furnish empty envelopes bearing the post-office stamp, where the same have never in fact been through the mail.

*B. B. Foster*, for the defendant.

*S. Tenny*, Assistant District Attorney, for the United States.

CHOATE, J. The defendant was indicted under Rev. St. § 3894, which provides as follows: "No letter or circular concerning lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail, in violation of this

section, shall be punishable by a fine of not more than \$500 nor less than \$100, with costs of prosecution."

The indictment contained two counts. The first count charged that the defendant "did unlawfully and knowingly deposit in the mail of the United States, and send to be conveyed by the said mail, a certain letter and circular concerning a lottery, which said letter and circular was then and there of the tenor and in the words and figures following, that is to say:

" 'NEW YORK, November 7, 1879.

" 'Chas. D. J. Noelke, Banker and Broker, 238 Grand street, between Christie and Bowery:

" 'DEAR SIR—Yours of the 5th inst., enclosing \$2, received. Enclosed please find 2  $\frac{1}{2}$  La. tickets, as per your order.

" 'Very respectfully,

" 'CHAS. D. J. NOELKE.

" 'All prizes payable in full on presentation of ticket.

" 'Official copy of drawings mailed as soon as received.' "

—Which said letter and circular was then and there enclosed in an envelope and addressed as follows, that is to say:

" 'M. MANY,

" 'Care of P. HOWELL, Esq.,

" 'Trenton, New Jersey,

" 'Mercer Co.' "

The second count charged that the defendant "did unlawfully and knowingly deposit in the mail of the United States, and send, to be conveyed by said mail, a certain circular concerning a lottery, which said circular was then and there enclosed in an envelope, which said envelope was addressed as follows:

" 'M. MANY,

" 'Care of P. HOWELL, Esq.,

" 'Trenton, New Jersey,

" 'Mercer Co.' "

—And which said circular purported to be an announcement of the one hundred and fourteenth grand monthly distribu-

tion of the Louisiana State Lottery, to take place at New Orleans, Tuesday, November 11, 1879, describing the list of prizes, the plan of the lottery, a list of capital prizes, and a statement of their authority for, and method of, doing business."

The defendant pleaded "not guilty," and after trial and verdict of "guilty" on both counts, he now moves in arrest of judgment, and for a new trial upon exceptions.

1. The first objection taken to the first count is that the writing set out in that count is improperly described as a "letter and circular." It is insisted that the statute, in prescribing a letter *or* circular, recognizes the distinction between the two things; that by a circular is intended a written or printed communication, general, and not personal, in its character, and that by a letter is intended a communication personal and individual in character, and not general; that if the paper set forth is a letter, then it is not and cannot be a circular, within the meaning of the statute, and if it is a circular, then it cannot be a letter. We think, however, that the same paper may be both a letter and a circular. No doubt there may be many circulars that are not letters, but a circular which is in the form of a letter may be well described as a letter and a circular, and there is no reason for excluding such a circular from the operation of the statute. There is nothing on the face of the paper set forth in the first count indicating that it was not a circular—that is, a paper intended to be issued to a great number of persons, or for general circulation—yet it, undoubtedly, is a letter in form. This mode of describing it may perhaps have imposed on the government the necessity of proving that the paper was both a letter and a circular; although, where an instrument is set out in full, the description has been held to be surplusage. *Rex v. Williams*, 2 Den. Cr. C. 67; *U. S. v. Trout*, 4 Biss. 105; *U. S. v. Burnett*, (this court, unreported.) But whether these cases apply to the present case or not, we think the count is not for this reason bad.

2. It is also objected to the first count that it omits to charge that the paper was one "concerning a lottery offering

prizes." This objection is based on an erroneous reading of the statute. The things prescribed are (1) "lotteries," (2) "so-called gift concerts," (3) "similar enterprises offering prizes," and (4) "schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences." The words "offering prizes," qualify and limit the words "similar enterprises." They indicate the nature of the similarity to "lotteries" and "so-called gift concerts," which must characterize other "enterprises" than "lotteries" and "gift concerts," to bring them also within the embrace of the statute. The words are wholly unnecessary, and would be tautological, as descriptive of "lotteries" and "gift concerts," for the offering of prizes is well understood to be an essential part of a "lottery" or a "gift concert." This, we think, is the obvious construction and meaning of the statute.

3. It is also objected to the first count that it omits averments necessary to show the illegal quality of the writing set forth; that as set out the paper does not on its face, and without explanation, concern a lottery; that the expression "La. tickets" is unintelligible until more than intrinsically appears is supplied by *innuendo*, and that there is no allegation of the existence of a lottery of and concerning which the paper was written.

It is undoubtedly an established rule of criminal pleading that in setting out a writing as an alleged violation of a statute, where words constitute the gist of the offence, if the paper itself, in its own terms, does not purport to be the thing prohibited, the indictment should by further averment or *innuendo* set forth that essential fact. The word "lottery" is not used in the paper set out in the first count. The expressions, "La. tickets," "all prizes," and "official copy of drawings," do not, perhaps, necessarily refer to a lottery, although it is difficult to imagine any other subject to which they could be reasonably attributed, but the paper is averred to be "a certain letter and circular concerning a lottery," and although this is an unartificial and informal mode of averring that the words "tickets," "prizes" and "drawings," used in the paper,

were used in reference to tickets, prizes and drawings of and in a lottery, we think that the defect is not available to the defendant after verdict.

By Rev. St. § 1025, it is provided: "No indictment found and presented by a grand jury, in any district or circuit or other court of the United States, shall be deemed insufficient; nor shall the trial, judgment, or other proceeding thereon, be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." This statute was passed in 1872, being the eighth section of "An act to further the administration of justice," and while its operation is necessarily limited by that provision of the constitution which secures to every person accused the right "to be informed of the cause and nature of the accusation," which has been held to mean that the offence must be set out "with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged," (*U. S. v. Cruikshank*, 92 U. S. 542-568,) yet we think that the informality of the averment, that the expressions used in the paper set forth were used concerning a lottery, was one which it was competent for congress to allow the accused to waive by going to trial on the indictment, and that this kind of imperfect and informal averment of a fact essential to make the offence complete, was one of those "matters of form" designed by the statute to be disregarded, when it appears that the defendant was not prejudiced thereby.

It is not the case of an entire want of an averment of a material fact, but rather a case of an informal averment of such fact, and yet the averment is such that no person of ordinary intelligence would fail to understand from reading the indictment that the meaning was that these expressions were void with reference to a lottery. The design of the statute was to discourage the practice on the part of defendants of lying by till after trial and verdict, and then in giving as ground for arrest of judgment mere defects of form, where to all reasonable certainty they had not been misled or prejudiced. And, whatever might be the effect of this defect in the

indictment on a motion to quash, or on demurrer, we think it no sufficient ground in arrest of judgment. It is quite clear the defendant suffered no prejudice on this account. We think, also, that this defect in the indictment is one of those defects of informal averment which, as distinguished from a defect consisting in the total want of an essential averment, is cured after verdict, even at common law. *Heymann v. The Queen*, 12 Cox Cr. C. 383; *Bradlaugh v. The Queen*, L. R. 32, B. D. 642.

4. It is also objected to the first count that it omits necessary allegations to show that, *in the sense contemplated by the statute*, the letter set forth was one concerning a lottery. The argument is that the statute was not intended to prohibit all letters concerning a lottery, but only such as were designed to promote and further the illegal or immoral business of setting up and carrying on lotteries. It is true that where an act is prohibited, and upon the necessary construction of the statute it is evident that the act is intended to be proscribed only under certain circumstances, or upon facts coming within the well understood reason of public policy which led to the enactment of the statute, it is not generally sufficient to charge the offence in the words of the statute. *Non constat*, the act may be within some of the implied exceptions, (*U. S. v. Gooding*, 12 Wheat 460; *U. S. v. Pond* 2 Curt. C. C. 265-268;) and no doubt many innocent letters may be written and sent by mail concerning lotteries; as, for instance, a letter from a man to his son, cautioning him not to be induced to spend his money for lottery tickets. This statute clearly has many implied exceptions. But we think that, assuming that there is, as we have held that there is, an averment in substance that the expressions in this letter set out referred to a lottery, it does appear clearly on the face of the paper that it was such a letter as is within the prohibition of the statute. It admits of no possible meaning unless it is understood to be a communication in the course of a direct dealing in lottery tickets. Such a letter is unmistakably within the reason and the prohibition of the statute.

5. The alleged defect in the second count is that the cir-

cular should have been set forth, not as it is by a description of its contents, but *in hæc verba*. Where the offence consists of words spoken or written, the general rule is that those words must be set forth in the indictment. This rule has been applied in a large number of cases, including the offence of sending threatening letters. *Rex v. Dogd*, 2 Easts. P. C. 1122. It seems to us that the present case is within the general rule. In the recent case of *United States v. Bennett*, the rule was recognized in a case of indictment for sending obscene matter through the mail, but it was held that the rule did not apply where it appeared by the indictment that the matter was too indecent to be put upon the records of the court, in which particular case the courts in this country have held that the rule does not apply. This objection appears to have been regarded as one of substance and not of form merely, and, therefore, it is not aided by verdict at common law. *Bradlaugh v. The Queen*, L. R. 32, B. D. 618. And for the same reason we think it is not cured by the statute above referred to. Rev. St. § 1025.

The motion in arrest must therefore be sustained, as to the second count, and overruled as to the first count.

6. The first three exceptions taken upon the trial were during the empanelling of the jury. A juror being called was asked by defendant's counsel, "Have you any prejudice against the lottery business, or those who are engaged in it?" This was objected to and excluded, and defendant excepted. He was then asked, "Are you disposed in your mind to put an end to the traffic in lottery tickets?" This was objected to and excluded, and defendant excepted. He was then asked, "Are you in favor of active measures for the suppression of the lottery business." This was objected to and excluded, and the defendant excepted. The juror had previously testified that he knew nothing about the case; and he subsequently testified, being further interrogated by defendant's counsel, that he had heard nothing and read nothing, nor talked with anybody at all, about the prosecution of lottery dealers, and that he felt he could go into the jury-box



without any prejudice for or against the defendant, and decide the case strictly within the evidence, without regard to anything that he had heard or known outside of the evidence. He was then sworn as a juror.

It must be assumed that the juror might have answered these questions in the affirmative, and the question is, would he be rendered incompetent as a juror by the fact that he had a prejudice against the lottery business or those who are engaged in it, or that he was disposed in his mind to put an end to the traffic in lottery tickets, or in favor of active measures for the suppression of the lottery business?

Parties have a right to be tried by an impartial jury. This does not mean that they have a right to have jurors who have no prejudices or no opinion as to the policy of enforcing the laws. If the juror had answered all these questions in the affirmative, it would only show that he entertained a prejudice in favor of enforcing the laws of the state of New York against lotteries, which have been in force for a great number of years. We see nothing in this prejudice to disqualify him. In fact, if he is a good citizen and fit to sit on the jury at all, he is found to have a prejudice against what is forbidden by law, and against those who break the law, and is bound, also, to be in favor of active measures for the enforcement of the criminal laws of the state.

The cases cited by the defendant as analogous to this are not in point. *Albrecht v. Walker*, 73 Ill. 69, was an action for damages for the sale of intoxicating liquor to plaintiff's husband. A juror testified that he had a prejudice against the business in which the defendant was engaged, but not against the defendant himself, and although he might have a prejudice against the man engaged in the business, he did not know that he would start out in the investigation with a prejudice against the man engaged in it. In reference to this Mr. Justice Breese says: "All honest men have a prejudice, so to speak, against larceny and other crimes, but if no prejudice exists against a party charged with the crime, we do not think that of itself is ground for challenge for cause."

In *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465-471, the juror

testified that he had a prejudice against insurance companies generally; that it was founded on the fact that he could not comprehend their proceedings, but that the prejudice would not affect his verdict. On this the court said: "It was error to overrule the challenge of the juror. \* \* \* A man may have a prejudice against crime, against a mean action, against dishonesty, and still be a competent juror. This is proper, and such prejudice will never force a juror to prejudge an innocent and honest man. As to this juror, the feeling he entertained against insurance companies was of a bigoted and reprehensible character," etc.

The case of *Maretzek v. Cauldwell*, 2 Abb. Pr. (N. S.) 407, was an action for libel respecting plaintiff's conduct as a theatrical manager. A juror testified that he was opposed to theatrical representations. It was held that he should not have been, as a matter of law, excluded on that account, but that it was ground only for challenge to the favor. But it will be observed that the juror had a prejudice against a whole class of persons, to which the plaintiff belonged, by reason of their being engaged in a business which was not unlawful. So, when defendants, who were Roman Catholics, were indicted for a riot, growing out of prejudices between Roman Catholics and others, it was held proper to allow a juror to be asked if he had any bias or prejudice against Roman Catholics. *People v. Christie*, 2 Abb. Pr. 256.

Where the subject-matter inquired about is one on which there is public agitation or diversity of opinion in the community, and strong feelings are excited, greater latitude of inquiry must clearly be allowed than where the question relates simply to a matter about which there is no such agitation or diversity of opinion. As to the business of dealing in lottery tickets, it seems to us that there is no such diversity of opinion or public agitation in respect to the policy of the laws prohibiting it, and in respect to its injurious effects upon the morals and well-being of the community, as to make these questions proper or reasonably necessary to ascertain the impartiality of the jurors. Moreover, at the time these questions were asked it had not appeared that the defendant

was a dealer in lottery tickets, and if the questions would have been competent at all as tending to disclose a prejudice against the defendant, that fact should, it seems, have been shown, or evidence of it offered. Without regard to that point, however, we think the facts offered to be shown immaterial, because they did not tend to disclose any prejudice which would render the juror incompetent. If the counsel expected to follow these questions up by others more material, he should have put such further questions or suggested the point. As the record stands it cannot be assumed that he desired to show against the competency of the juror anything more than would have been shown by affirmative answers to these questions.

7. Objection was also made to the admission in evidence of other papers enclosed in the same envelope with the letter or circular set forth in the first count, as it was put in the mail. Those other papers tended strongly to show that the paper set forth related to a lottery. They were the circular described in the second count, and two tickets purporting to be tickets in a lottery called "The Louisiana State Lottery." There can be no doubt that they were competent evidence as part of the *res gestæ*.

8. A witness for the prosecution testified that he visited the place of business referred to in the letter set forth in the first count, No. 238 Grand street, a few days after the time alleged in the indictment when the letter was mailed; that he saw there several other papers bearing the same device or monogram as was on the papers enclosed with said letter, and saw the defendant there with a hand stamp make the same impression on a slip of paper.

The witness was then asked: "What else did you see and do there at that time?" This question was objected to. The objection was overruled, and the defendant excepted. The witness then testified to seeing a lottery ticket sold there by defendant's clerk, while defendant was present, and to statements made by the defendant to the witness that this clerk was in his employ, and that this was his business; and that the defendant tried to prevent a deputy marshal, who was

with the witness, from entering the place. To this evidence the defendant objected, and moved to strike it out. The motion was denied, and defendant excepted.

The witness further testified, under defendant's objection and exception, that he found in the front office a place for the sale of lottery tickets, and in the back part a policy shop. It is now insisted that this testimony was wholly irrelevant and "utterly foreign to the charge." It seems to us, however, that it tended to trace to the defendant the possession prior to their mailing of the papers enclosed in the envelope, and his declarations as to his business, so soon after the mailing of this letter, were competent as bearing on the question, whether or not it was he who mailed the letter. It tended to show that he had motive and opportunity to commit the offence with which he was charged, and such circumstantial evidence is always competent.

9. After the district attorney had announced the testimony for the prosecution closed, the defendant moved for an acquittal on the ground that no evidence had been introduced tending to show the existence of a lottery of and concerning which the papers in question were written or made. The district attorney then asked time to supply this proof, which was granted, under objection and exception on the defendant's part, and an adjournment was had for this purpose. It is now insisted that this was error, but we are of opinion that it was within the discretion of the presiding judge to permit the case to be re-opened.

10. On the coming in of the court the district attorney offered in evidence pages 24, 25, 26, of a volume entitled "Laws of 1868 of the State of Louisiana," being an act to authorize the incorporation and establishment of the Louisiana State Lottery Company, to be referred to. This was objected to on the ground that a private act cannot be proved by the introduction of a book containing it. The objection was overruled and the defendant excepted. The book from which this act was read has been before us. It bears the imprint, "published by authority," on the title page. The act in quotation is entitled "An act to increase the revenues

of the state, and to authorize the incorporation and establishment of the Louisiana State Lottery Company, and to repeal certain acts now in force."

The first section is as follows: "That, whereas, many millions of dollars have been withdrawn from and lost to this state by the sale of Havana, Kentucky, Madrid and other lottery tickets, policies, combinations and devices, and fractional parts thereof, it shall hereafter be unlawful to sell, offer or expose for sale any of them, or any other lottery, policy, or combination ticket or tickets, devices or certificates, or fractional parts thereof, except in such manner and by such persons, their heirs, executors or assigns, as shall be hereinafter authorized."

The second section declares that certain persons named "are hereby constituted and declared a corporation for the objects and purposes, and with the powers and privileges, hereinafter specified and set forth," and then follow "articles of incorporation," which declare, among other things: "The objects of and purposes of this corporation are—*First*, the protection of the state against the great losses heretofore incurred by sending large amounts of money to other states and foreign countries, for the purchase of lottery tickets and devices, thereby impoverishing our own people; *second*, to establish a solvent and reliable home institution for the sale of lottery, policy and combination tickets, etc., at terms and prices in just proportion to the prizes to be drawn, and to ensure perfect fairness and justice in the distribution of the prizes; *third*, to provide means to raise a fund for educational and charitable purposes for the citizens of Louisiana."

The articles also provide that the corporation shall pay to the state of Louisiana \$40,000 per annum, to be credited to the educational fund. The third section of the act imposes a penalty on any person for selling or offering for sale any lottery tickets in violation of the act. The fourth section grants to the corporation the exclusive privilege, for 25 years, of establishing a lottery and selling tickets. The seventh section repeals certain laws, namely: An act, passed February 17, 1866, entitled "An act to license the vending of lottery

tickets;" "An act to authorize the sale of stamps to vendors of lottery tickets," passed February 28, 1860; and an act to amend the last named act, passed March 22, 1866, and "all other laws, or parts of laws, inconsistent with or contrary to the provisions of this act."

The acts thus expressly repealed are general statutes. The act of February 17, 1866, was an act creating offences and imposing penalties. We have no doubt that this statute read in evidence is to be regarded as a general statute or public act, and not as a private act. It is largely made up of provisions in the nature of general legislation, and the fact that, incidentally, and as a means towards making such general legislation effectual, it grants corporate powers to certain persons, does not make it the less a general law. Laws are either public or private, and this is clearly public. Other objections that it was not proved as a private law have no force.

11. The prosecution having rested again, defendant's counsel renewed his motion to direct a verdict of acquittal upon the ground specified in the former motion, that there was no evidence of the existence of a lottery of and concerning which the papers in question could have been written or made, or that they are letters and circulars concerning any lottery; also on the further ground, that, be the act what it may, there is no evidence of any action or acceptance of the charter there tendered, or that any organization under that act was ever effected by the corporators named therein, or that the corporation, if it ever existed, had not been dissolved by some one of the various methods known for the dissolution of corporations at the time the indictment was found, or that the charter had not been forfeited or withdrawn by subsequent legislation. This motion was denied and defendant excepted. This exception is based upon the theory that it was necessary for the government to prove that the lottery was one established by law, having a legal existence; that it was necessary to prove that the party or parties who issued the tickets enclosed in the envelope, which purported to be issued by the Louisiana State

Lottery Company, were a corporation, as they purported to be; that they had and carried on a real lottery.

There was abundant evidence in the case, to justify the denial of the motion, that there were some parties purporting to be and calling themselves by the name of the Louisiana State Lottery Company who were carrying on a lottery, but it was wholly immaterial whether they were the same persons named in this act, or whether those persons had accepted their charter or not. It was none the less a lottery in fact and within the prohibition of the statute, whether legally established or wholly illegal, whether its promoters were duly incorporated or not. Indeed, we think that the mailing of a letter or circular concerning a projected lottery, one not yet in existence, would clearly be within the letter and spirit of the statute, if it were a letter or circular promoting or designed to aid in the organization and setting up of a lottery. There was, therefore, no reason why, at this stage of the case, the court should direct an acquittal of the defendant, when the papers themselves, with the mailing of which he was charged, bore on their face strong if not conclusive evidence that they related to an existing or established lottery. No more evidence of the existence of a lottery need to have been given to justify a conviction than the papers and tickets enclosed in the envelope.

12. The defendant offered no evidence, and the remaining exceptions are to the judge's charge to the jury. The judge charged the jury, among other things, as follows: "In order to convict, you must find that it is a letter concerning a lottery in the one case, and circular concerning a lottery in the other. In determining that question you are not confined to the words in the paper. You may look at the surrounding circumstances; the letter sent which was the order, the tickets enclosed in Exhibit No. 1, (*i. e.*, the letters set out in the first count,) apparently in compliance with the order, the occupation of the defendant, and all the other circumstances in the case, in order to determine whether or not that letter, forming the subject of the first count, was concerning a lottery. If you find that it was concerning a lottery, then it was an

illegal article in the mail, in case you find it to have been there deposited. If you find that this Exhibit No. 1 was deposited in the mail, and you find that these two papers that were in it—in one case a letter and in the other case a circular—were concerning a lottery, then the question arises, who deposited these papers in the mail? Before proceeding to that I should remark that there has been evidence going to show the existence of a lottery known as the Louisiana State Lottery. The evidence from the statute-books of the state of Louisiana, together with the sale of the tickets put in evidence, in the absence of any evidence to the contrary, will justify you in finding that there is such a lottery as the Louisiana State Lottery. If you find that this letter, Exhibit No. 1, was deposited in the mail, and that the papers in it are concerning a lottery in existence—the Louisiana State Lottery—you then come to the question whether the defendant is shown to have deposited Exhibit No. 1 in the mail, as charged."

The court further charged the jury that they must be satisfied, beyond a reasonable doubt, that the letter (Exhibit No. 1) was mailed; that the papers in it were concerning a lottery, and the man who deposited it, or caused it to be deposited, was the defendant. The defendant excepted to that part of the foregoing portion of the charge which states that the occupation of the defendant is to be considered in determining whether the letter concerns a lottery, and that the jury may resort to surrounding circumstances to determine as to the character of the letter and circular; also to the language, "that the evidence of the statute-book and the sale of the tickets have proven that there is such a thing as the Louisiana State Lottery;" and thereupon the court further charged that the evidence of the statute of Louisiana and of the sale of tickets was evidence from which the jury may conclude that there is such a lottery, in the absence of proof to the contrary. To this further charge the defendant excepted.

That the defendant's occupation of a dealer in lottery tickets, and the other extrinsic circumstances, were proper to be considered by the jury, on the question whether the letter



related to a lottery, if, in their judgment, they threw any light on the meaning of the letter, in case its meaning was doubtful, which it does not seem to us to have been, we think there can be no question. A party's acts and declarations may always be resorted to to show the meaning of his writings, and obscure or doubtful expressions can often be only elucidated by a reference to surrounding circumstances.

There was no ground of exception in that part of the charge which, upon this question, whether the letter was concerning a lottery, allowed the jury to consider the fact that there was such an act on the statute-book of Louisiana. In determining whether or not there was such a lottery as that named upon the papers enclosed with the letter, the fact that such an act had been passed was a circumstance that was competent evidence. The tickets and papers enclosed were such as would be likely to follow and result from the passage and acceptance of such an act, and although there was no other evidence that the statute had ever been acted upon, these papers were, we think, some evidence of that fact; and there was a correspondence and apparent connection between the act and the tickets and papers which made the act, without further evidence of any action taken under it, which are circumstances tending to show that there was in fact such a lottery. As we have held above, the regularity of the organization of the company, or the legality of the acceptance of the charter, or its combined legal existence, were wholly immaterial and aside from the question in this case. In the particulars thus excepted to we think the defendant has no just ground of complaint.

13. The judge also charged the jury as follows: "If you find that the accused received an order for two half tickets, such as were in the letter, Exhibit No. 1, together with two dollars enclosed therefor, sent to him under a fictitious name; and if you find that Exhibit No. 1 was thereafter deposited in the post-office for mailing, and was a compliance with the order which the accused had received, those circumstances, together with the undisputed fact that the accused was engaged in selling lottery tickets; that the name used in the

address of the letter in Exhibit No. 1 was the same as that signed to the order, and was fictitious; and that the letter was accompanied with tickets bearing his stamp and his business card, in the absence of evidence tending to show the contrary, will justify the conclusion that the defendant was the person who did deposit in the post-office, for mailing, the letter, Exhibit No. 1, or procured it to be so deposited." To this part of the charge the defendant excepted. The judge, also, in the same connection, distinctly charged the jury that this was a question of fact for them to pass upon, and that they should give the defendant the benefit of any reasonable doubt arising from the lack of sufficient evidence; that if the evidence given on the part of the government did not satisfy their minds on the disputed question of fact, they were to give him the benefit of the doubt; but, if they were satisfied beyond a reasonable doubt, it was their duty to convict him. We think there was no error in this portion of the charge. The question of fact was fairly submitted to the jury, and the matters referred by to the court were such as they had the right and were bound to consider, in determining that question.

14. The defendant's counsel requested the court to charge as follows: "No presumption arises in this case from the impression of a post-office stamp upon the envelope enclosing either of the papers in evidence as to the mailing of any or either of such papers." The court refused so to charge, and defendant excepted. The letter in question bore the stamp or mark of the New York post-office, and it is conceded that the general rule is that such a stamp or mark would be *prima facie* evidence that the letter had been in the mail; but it is contended that no such presumption arises in this case, because there is evidence that the witness, Comstock, who testified that he took these letters from the mail, also testified that he had received, from the postmaster at Trenton, N. J., and other postmasters, during the past twelve months, a large number of empty envelopes, bearing the stamps of three post-offices, which had never been through the mail.

The letter or order referred to in the charge to which the

letter, Exhibit No. 1, appeared to be an answer, was testified to by the witness as being enclosed in such a stamped envelope, bearing the postmark of the Trenton office, and he testified that he delivered it to the superintendent of the registered letter department at the New York post-office on the sixth of November, 1879, the day after its date, and the day before the date of Exhibit No. 1. The argument is that this evidence shows such a deviation from the system of business on which this presumption rests that the presumption fails. We think, however, that there is nothing in this evidence which controls or prevents the application of the general rule of evidence that the regular postmark is presumptive evidence of the mailing of the letter. It does not show, as defendant's counsel claims, any "gross irregularities on the part of officials of the post-office, or that the supposed system is so disregarded as to be no system." Notwithstanding the occasional departures from the rule shown, which appears to have been in aid of justice, the general rule remains that the postmark is an indication that the letter offered in evidence has been through the mails.

Upon the whole case, therefore, we find no error upon the trial, and the motion for a new trial must be overruled.

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SWENSON *v.* HALBERG and another.

(*Circuit Court, D. Minnesota.* March, 1880.)

**FORECLOSURE BY ADVERTISEMENT—NOTICE OF SALE—CLAIM FOR ATTORNEY'S FEES.**—The insertion of a claim for \$50, for attorney's fees, in the published notice of a foreclosure sale, under a statute of the state of Minnesota, where the mortgage only stipulated for the payment of \$25 for attorney's fees, in the event of such foreclosure, will not invalidate a sale made in accordance with such notice, in the absence of fraud and prejudice to the mortgagor or owner of the equity of redemption.

**SAME—SALE OF SEVERAL TRACTS IN ONE PARCEL.**—The sale of several tracts in one parcel, contrary to the provisions of such statute, will not be disturbed, in the absence of fraud and prejudice to the mortgagor or owner of the equity of redemption.

HOMESTEAD—SALE UNDER FORECLOSURE—REDEMPTION BY ASSIGNEE IN BANKRUPTCY.—The redemption of a homestead from foreclosure sale by an assignee in bankruptcy does not enure to the benefit of the bankrupt and his assigns.

*Davis, O'Brien & Wilson*, for plaintiff.

*Geo. L. & Chas. E. Otis*, for defendant.

NELSON, J. The plaintiff brings his action of ejectment to recover the property hereinafter described, which is tried by the court without a jury.

It is admitted the plaintiff, on December, 26, 1864, was seized of the property described as block five (5) in the platted town of "Centre City," in the state of Minnesota. On that day he conveyed it to Louis Shogren and John Shogren, together with lots 1, 2, 3, 4 and 5, in block 4, in that town. On July 17, 1868, Louis and John Shogren gave a mortgage of all this property to J. N. Castle, who assigned it to H. F. Noyes, October 10, 1868. This mortgage was foreclosed by advertisement under the laws of Minnesota, and on April 23, 1870, the mortgaged property was sold at public auction, and was bid in by H. F. Noyes, to whom a certificate was given by the sheriff, dated May 12, 1870. The sale, however, was subject to the redemption provided by law. The property was sold by the sheriff in a body, not in separate lots or tracts, and the published notice of foreclosure sale, in specifying the amount claimed to be due, included therein the debt, interest, and \$50 attorney's fees, whereas, the mortgage, in terms, stipulated for \$25 attorney's fees. Two certificates were issued to the purchaser—the first, executed by the sheriff, but not in his official capacity; the second, properly executed, to cure defects. The second certificate, of the same date as the first, was assigned on June 25, 1870, by H. F. Noyes—one-half to Louis Torenus, one-fourth to I. E. Staples, and one-fourth to W. G. Bronson. All the aforesaid instruments were duly recorded.

On May 12, 1869, John Shogren and wife executed a deed of the property embraced in the mortgage to Louis Shogren. Louis Shogren was adjudged a bankrupt June 14, 1870, on a petition filed on the third day of the same month, and

Enoch Horton was appointed assignee, and an assignment was made to him of the bankrupt's estate, by the register in bankruptcy, August 16, 1870, and he filed a certificate of exempt property on August 23, 1870. Torenus, Staples and Bronson submitted exceptions to this certificate, and after argument, on February 18, 1871, an order was entered setting aside the designation of exempt property, deciding that block five (5) was the homestead of the bankrupt, and directing the assignee to set it aside. On May 19, 1871, the bankrupt and wife conveyed block five (5) to the plaintiff, and under this deed he claims title.

Horton, the assignee, having first obtained an order therefor from the court, redeemed from Torenus, Staples and Bronson, who held the certificate, the property mentioned therein, including block five, (5,) on April 21, 1871, three days before the equity of redemption vested in the bankrupt expired. He was compelled to pay to them the full amount, as the property was originally sold in one body, and to redeem with the other premises block five, (5,) the homestead, in which the bankrupt had an equity of redemption only.

The time for redemption by the bankrupt expired April 23, 1871, and no steps were taken by him to perfect his title to block 5, thus set apart to him as a homestead. He allowed the time for redemption to lapse, and the assignee obtained an order June 20, 1871, to sell the property in block 4. He, however, sold not only this property, but block 5 also, which was not included in the order, and on October 23, 1872, the sale was confirmed. At this sale all the property was purchased by Torenus, and the assignee executed to him a deed October 3, 1872. Torenus conveyed to the defendant Halberg October 23, 1873, and Halberg conveyed to defendant Peterson May 12, 1873. This controversy is with reference to the title to block five (5.)

The plaintiff urges—*First*, that the foreclosure and sale under the advertisement was void, for the reason that a larger attorney's fee was claimed than stipulated in the mortgage; *second*, that the same was void for the further reason that the

property was not sold in separate parcels, or tracts, as the statute required; *third*, that the redemption of the homestead from the sale enured to the benefit of the bankrupt and his assigns, and satisfied and cancelled the mortgage, and all title derived under it.

It is sufficient to say, upon the first two propositions, that the foreclosure was regular. There is no fraud charged, and it does not appear that the other party was prejudiced by the insertion of \$50, instead of \$25, as attorney's fees. The mistake is not such as will disturb the sale; neither will it be set aside, for the reason that the tracts were not sold separately. The section of the law requiring the sale of separate and distinct tracts in separate parcels is directory, and the sale will not be disturbed unless it was sold fraudulently, or it is shown that the mortgagor or owner of the equity of redemption was privileged thereby. 24 Minn. R. 281. It does not appear that the sale of the separate tracts in a body was the result of actual fraud, and it is not shown that Shogren was prejudiced thereby. He made no effort, as before stated, to secure his homestead, which was subject to the mortgage.

The third proposition cannot be sustained. The assignee redeemed the mortgaged property from the foreclosure sale, by virtue of the bankrupt law, under the order of the court. The equity of redemption to a portion of the mortgaged property was vested in the assignee as the representative of the estate of the bankrupt, and, under the authority of the bankrupt act, he was ordered to redeem. The rule in this state is, that a person having an equity of redemption in a part of real estate sold may redeem from the sale, and this property being sold in a body and for one price, the assignee was compelled, in order to redeem the only property to which he had any right, to pay the full amount of the bid, and take a certificate of redemption for the whole property. In doing this he took, by the redemption, block five, (5,) subject to Shogren's right to redeem from him. He was not authorized by this order of the court to redeem for the benefit of any

but the creditors of the bankrupt, and Shogren's equity of redemption in block five (5) was not destroyed.

The assignee is not governed by the state statute regulating the proceedings necessary to be followed by a mortgagor or creditors in redeeming. Of course the law prescribing the time within which the right of redemption can be exercised will apply, and it cannot be extended by the bankrupt courts. Having full control over the bankrupt's estate after adjudication, the law itself and the spirit and object of it govern the court in the exercise of its jurisdiction, necessary "to collect all the assets of the bankrupt, \* \* \* liquidation of liens, \* \* \* and to the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties," etc. Section 1, Bankrupt Law.

It is the duty of the bankrupt court to protect the rights and interests of the bankrupt, as well as the creditors, and secure to the former all the law allows in the way of exemptions, but no more. The assignee had no title by virtue of the assignment to him of the block five, (5,) which was declared to be the homestead.

The decision of the bankrupt court did not enlarge the present interest of the bankrupt in this homestead. His right, title and interest therein were only an equity of redemption, and by the redemption from Torenus and others the assignee held this block subject to this right, and the bankrupt, by proper proceedings, could have had his interest adjusted before he lost it. His homestead right in block 5 was fully recognized by the court two months before the time for redemption expired, and the bankrupt made no effort to ascertain the amount necessary to redeem it.

The homestead exemption act (Minn. Rev. St. § 2) provides that "such exemption shall not extend to any mortgage thereon lawfully obtained." The bankrupt court, on application, in marshaling the assets, would have, by appraisement or otherwise, fixed the sum necessary to be paid in order to entitle the bankrupt to the homestead, free from all liens.

Instead of applying to the court, the bankrupt allowed his

right of redemption to expire, and therefore the plaintiff took nothing by the deed executed May 12, 1871.

Judgment will be entered in favor of the defendants.

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**DONOHUE and others v. ROBERTS and others.**

(*Circuit Court, E. D. Missouri.* March 13, 1880.)

**ACCOUNT—JOINDER OF ADMINISTRATOR AND SURETIES IN THE SAME SUIT—PAYNE v. HOOK, 7 WALL. 425; 14 WALL. 252, FOLLOWED.**—An administrator and his sureties may be joined in a suit against the administrator for an account and settlement, and for judgment against the sureties for the balance found due upon the settlement of such account.

**ADMINISTRATOR—SURETIES—FRAUDULENT AND COLLUSIVE CLAIM.**—It cannot be determined upon demurrer whether such sureties are liable for the alleged fraud and collusion of the administrator in the proof and allowance of his own individual claim against the estate of his intestate.

**In Equity. Demurrer to complaint.**

*Lucien Eaton*, for complainants.

*Louis Houck*, for respondents.

McCrary, J., (*orally.*) This case was submitted upon a demurrer to the complainants' bill. The bill is brought by the heirs of Mrs. Roberts, against her administrator and his sureties, charging fraud in the settlement of the accounts of the estate, and seeking to have a settlement of the amount due from the administrator, and to recover the same as against him and his sureties. The demurrer raises the question whether the two can be joined in one action—that is, a suit against the administrator to settle his accounts and to recover the balance, and at the same time against his sureties to obtain judgment against them for whatever balance may be ascertained. That question has been fully settled by a case which went up from this court and was twice considered by the supreme court of the United States. *Payne v. Hook*, 7 Wall. 425; 14 Wall. 252, where the same question was fully considered, and the right to join the administration and his

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sureties in such a suit for these purposes, fully sustained. The further question is made, which is this: The administrator of this estate presented a claim in his own behalf, and, for the purposes of the settlement of that claim, a temporary administrator was appointed, called under the statute, I believe, an attorney to represent the heirs. There was a hearing upon that matter, and the claim was allowed. It is now insisted that the sureties of the administrator are not responsible for any fraud committed in that transaction. The bill, however, charges collusion and fraud on the part of the administrator in connection with this transaction, and it will depend, I think, altogether on the proof as to whether he is liable in his official capacity; and if liable, of course his sureties are liable. That matter can be determined only after the proofs are submitted.

The demurrer to the bill is overruled.

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JEFFRIES, Adm'r, v. UNION MUT. LIFE INS. CO.

(Circuit Court, E. D. Missouri. January 26, 1880.)

LIFE INSURANCE—WARRANTY—AVERMENT OF APPLICANT THAT HE IS A SINGLE MAN.—The averment of a married man, in an application for life insurance, that he is a single man, amounts to an absolute warranty.

ATTORNEY AT LAW—COMPROMISE OF SUIT—EXPRESS AUTHORITY—SATISFACTION OF JUDGMENT.—The entry of the satisfaction of judgment on the record of the court will not be set aside, where such satisfaction was entered, pending a writ of error to the supreme court in behalf of the defendant, upon part payment of the judgment, under a compromise with the duly authorized attorneys of the plaintiff, although such entry of satisfaction was not made in open court, and the original plaintiff had died pending such compromise, and the authority of the attorneys had not been ratified by the administrator *de bonis non*.

Motion to set aside entry of satisfaction of judgment.

Waldo P. Johnson and John Flourney, for plaintiff.

John R. Shepley, for defendant.

TREAT, J., (orally). I have had under consideration a matter concerning which there are a great many incidents. I am not disposed to go into those matters at any consider-

able length. A suit was brought in this court, by an administrator named Jeffries, on a life insurance policy. The case went from this court to the supreme court of the United States, and the supreme court reversed this court on this proposition. The averment made in the application by the insured was that he was a single man and not a married man.

This court held, in the light of the authorities as they were then supposed to exist, that that question should not be held as an absolute warranty, but, connected with the facts, to be submitted to the jury, whether it was a matter material to the case. The supreme court held the sharp doctrine that it was a warranty, and if he represented himself as single and was married, there could be no recovery. The case came back for trial and evidence was produced to show that the representation of the plaintiff was written down as an answer by the agent of the underwriter, he, the agent, supposing that to be the man's condition, without relying upon his statement or paying any attention to it. The matter came up for trial and the jury found for plaintiff, and the court set aside the verdict, as it did not think the testimony sufficient to establish the fact. A second trial was had—a fuller trial—and a verdict was again rendered for the plaintiff, and the case was taken by the insurance company to the supreme court of the United States. In the ordinary course of decisions there this case would not have been reached, possibly, for some years. The counsel for the insured then, after correspondence with the insurance company, agreed to take what was about two-thirds of the amount of the judgment, in round numbers. The proposition being accepted, thereupon counsel did receive the sum of money pursuant to the compromise, to-wit, the two-thirds, and entered satisfaction of the judgment.

The question presented to the court is upon a motion to set aside that entry of satisfaction, first, because a counsel employed to prosecute a case has no right to compromise it. Such is the view of the supreme court of the state of Missouri; but the rulings are largely in conflict. But this case has another aspect: the original plaintiff entered into a spe-

**oific contract**—which I certainly do not think commendable—whereby these attorneys, (two in number,) should prosecute this extremely doubtful claim; they to receive a certain portion of the proceeds, with full power to compromise as they should please. And they prosecuted under these doubtful circumstances, and finally compromised, and, having compromised, the defendant company has paid this money. It is contended that the attorneys thus compromising did an act which is void in itself, and that without the money paid being returned, to-wit, about \$9,000, the compromise may be declared void, and execution be issued for the whole amount of the judgment.

I am not disposed to go into an examination of the authorities, but merely state, for the purposes of the determination of this motion, that here *express authority* was given with regard to the matter; that this claim was very doubtful, and that in my judgment the compromise was rightly made. I heard the case three times, and in my opinion plaintiff would not have gotten a sixpence before the supreme court. I think that the attorney acted, so far as money considerations are concerned, very wisely. Should this entry be now set aside? On what ground? That the entry was made during a term of court on the record instead of in open court? It so happens that there is no express statute of the United States as to entering satisfaction; but it is claimed that by analogy we might follow the state statute, and if we follow that practice, this entering of satisfaction may be made in open court or in vacation, on the margin of the record. But if, on the facts stated, this entry is found to be void, the court would permit the party to appear in open court at this moment, merely to cure a technical error.

Now, the difficulty arises on the face of the contract. Under the old common law such a contract would not have been permitted. I think it would be better if the old common law was retained with regard to it; but such is not the law, unfortunately. Parties, at their own expense, may pursue a doubtful demand, and, when the result is accomplished, the contract is upheld. But it is said again, that the original plaintiff

died pending the proceedings, and a revivorship was had in the name of the administrator *de bonis non*; that this new plaintiff did not enter into any contract or ratify the old one; and that, therefore, the power given to the attorney to compromise could not be considered as applicable to matters as they stood on final hearing. Now, I suppose, when a contract is made by a party he who succeeds in interest to him is bound by the original contract.

But this motion is against a defendant that has paid between \$9,000 and \$10,000, to declare all the proceedings had under the circumstances void, and hold that company liable to execution for the whole amount of the original judgment; a part of the agreement to compromise being that the defendant insurance company should dismiss its writ of error in the supreme court of the United States, which it has done. How can you put this company into its original position? It must lose this amount of money; is out of the supreme court, and is remediless by the fault of the original plaintiff, and the contract which he chose to enter into. Such would be neither justice nor right, without going into the extreme proposition as to whether an attorney employed in the case has a right to compromise it. In this case there was a specific contract, and I overrule the motion.

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CUNNINGHAM v. COUNTY OF RALLS.

(Circuit Court, E. D. Missouri. March 27, 1880.)

JURISDICTION — ACTION AGAINST COUNTY — REV. ST. OF MISSOURI, § 5359.—Section 5359 of the Revised Statutes of the state of Missouri, which provides that "all actions whatever against any county shall be commenced in the circuit court of such county," etc., does not deprive the federal courts of jurisdiction in an action against a county of such state brought by the citizen of another state.

Demurrer to plea to the jurisdiction.

Overall & Judson, for plaintiff.

Henry A. Cunningham, for defendant.

McCrary, J., (*orally*). This is a suit on bonds issued by the county of Ralls on the tenth day of February, 1870. Plaintiff is a citizen of the state of Indiana, and brings suit upon the bonds in this court. There is a plea to the jurisdiction. No question is made as to the citizenship of the parties, nor is it claimed that there is anything to bar the jurisdiction of this court except a recent statute of the state of Missouri, which is found in section 5359 of the Revised Statutes of Missouri of 1879, providing as follows: "All actions whatsoever, against any county, shall be commenced in the circuit court of such county, and prosecuted to final judgment and execution therein, unless removed by change of venue to some other county, in which case the action or actions so removed shall be prosecuted to final judgment and execution in the circuit court of such other county."

This is an amendment to a previous statute, which read as follows: "All actions, local or transitory, against any county, may be commenced and prosecuted to final judgment in the circuit court of the county against which the action is brought." 1 Wagner St. 408, § 4.

In a case against Lincoln county, brought before this court sometime ago, there was a plea to the jurisdiction, under the original statute above quoted, which was overruled, (7 Cent. Law J. 264,) Judge Dillon expressing the decided opinion that the statute did not take the case out of the jurisdiction of this court. He further said that if the statute was intended to have this effect it would, under the ruling in the case of *Insurance Co. v. Morse*, 20 Wall. 445, be unconstitutional; and he added: "We cannot assent to the conclusion that it is within the power of the state to create political bodies capable of contracting debts with citizens of other states, and yet privileged against being compelled to pay those obligations by suit in the national courts."

It will be seen that no stress was placed upon the fact that the language of that act was permissive, using the word "may" instead of "shall," but the ruling was put upon the ground that the jurisdiction of the federal courts cannot be interfered with by state legislation. The recent statute, if

construed as regulating proceedings in the state courts, is, of course, entirely valid, and so far as I can see it is altogether proper. But it is perfectly clear, both upon reason and authority, that it cannot be invoked for the purpose of cur-tailing or abridging the jurisdiction of courts of the United States.

If we concede that the state, by legislation, can deprive the federal courts of jurisdiction in one case by declaring that certain parties shall be permitted to sue or be sued in the federal courts, it would follow, of course, that the state might by their legislation deprive the federal courts of all jurisdiction. For, if the state can, by its own act, provide that one citizen shall not sue or be sued in a federal court, in a case coming within the constitution and laws of the United States, it may, in like manner, exclude all its citizens from the federal courts.

In the case referred to by Judge Dillon, which was the insurance company against Morse, *supra*, the supreme court of the United States said: "The constitution of the United States declares that the judicial power of the United States shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and to the treaties made or which shall be made under their authority; \* \* \* to controversies between a state and citizens of another state, and between citizens of different states.

"The jurisdiction of the federal courts, under this clause of the constitution, depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the federal courts, nor can it limit or restrict the authority given by congress in pursuance of the constitution. This has been held many times." *Railway Co. v. Whitton*, 13 Wall 270-286, and other cases.

It is therefore clear, both upon reason and upon authority, that we must sustain the demurrer to the plea to the jurisdiction in this case, and it is so ordered.

## RUTHERFORD v. THE PENN. MUT. LIFE INS. CO.

(Circuit Court, E. D. Missouri. March 12, 1880.)

PRACTICE—SUPERSEDEAS—MOTION FOR A NEW TRIAL—SECTION 1007, REV. ST., CONSTRUED.—A writ of error will operate as a *supersedeas*, under section 1007 of the Rev. St., if duly served "within 60 days, Sundays exclusive," after a motion for a new trial has been overruled.

A. R. Taylor, for plaintiff.

W. H. Clopton, for defendant.

McCARY, J., (orally.) This case presents a question of practice of some importance, in its application to this case as well as others; but it is one upon which I have no difficulty. The question is whether the defendant here has lost its right to a *supersedeas* on account of the delay which has occurred since the trial of the case.

The statute (Rev. St. § 1007) provides that "in any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office, where the record remains, within 60 days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. \* \* \*" And the question arises upon the meaning of the words "within 60 days, Sundays exclusive, after the rendering of the judgment complained of."

I apprehend that the statute ought to be construed so as to commence the time from the final judgment. In this court there was a motion made for a new trial in this case, and the order of the court was made suspending the execution until the determination of that motion. The motion for a new trial was made in pursuance of the right which is given by the statute in section 726. I have no doubt of the right of any party to have a motion for a new trial heard under this section: "All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law." In the trial of causes it often happens that in the hurry of the trial questions arise which

the court is obliged to pass upon without that consideration which is desirable; and the policy of the law is always to provide ample means to a review or reconsideration of the questions which may arise in the course of a jury trial, and to reserve to the court a right, upon a reconsideration, to set aside the judgment or modify it, if the ends of justice and the law seem to require it. Therefore, I think that, under section 726, the party had a right to make his motion for a new trial.

But there is another section that has been called to my attention—section 987 of the Revised Statutes. This section still further provides for motions of this character, and it applies to the case where a party is not prepared at the time of trial so immediately file his motion. It provides for giving time within which that may be done. It says: "When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed execution may, on motion of either party, at the discretion of the court, and on such considerations for the security of the adverse party as it may judge proper, be stayed 42 days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial." \* \* \* \* And then follows a provision, that "if such petition is filed within said term of 42 days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse, at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void."

Now this is not the only section under which the party can apply for a new trial. His right to apply is independent of this section. This provides for a case where he desires to obtain from the court an extension of the usual time within which to make his application for a new trial; and in that case, where he gets such time merely to apply, he must show that he has presented his petition, and that it has been allowed in accordance with the provisions of the section; but



if he makes his motion for a new trial without asking for the time, then he can make it independent of section 987, and is not bound by the provisions of that section. In other words, the court had a perfect right to entertain the motion for a new trial; it did entertain it, and suspended the execution until it should be determined.

Now the judgment cannot be said to have been finally rendered until the determination of the motion for a new trial in this case. That is very clear, when it is considered that the motion might have been sustained as well as overruled, and in that case the effect of the action of the court would have been as if there had been no judgment, or it had been the other way. And, if the doctrine contended for by the plaintiff should be sustained, it might result that there would be a case pending in the supreme court on appeal from a judgment which was never rendered, in point of fact, in this court. The construction of section 987 will illustrate what I have said upon this point. Under that section, where a party applies for time to file his application for a new trial, the motion, as you will perceive, may be granted at the next term; and the extension shall, of course, be further stayed until the next session of the court, if the party is allowed to file his petition. Now, suppose in the meantime he has taken his writ of error and gone to the supreme court, and has obtained, perhaps, a hearing and decision in the supreme court, and after all that a motion for new trial comes up in the court below and is sustained.

It is manifest that such is not the intention; in other words, it would be an anomaly to provide for an appeal or writ of error from a suspended or inoperative judgment. I think it is fair, although it is a liberal construction of the statute, to say that the time begins to run from the day when the motion for a new trial is overruled; and that is the construction I give it in a case where the application has been made in time, and execution suspended. Of course, if I am wrong, a motion to set aside the *supersedeas* can be made in the supreme court, I apprehend, and the question there be finally determined.

You may present your bond, and the court will pass upon the sufficiency of the sureties.

Citing—*Silsby v. Foote*, 20 How. 290; *Brockett v. Brockett*, 2 How. 238; *Green v. Van Buskirk*, 5 Wall. 307; *Telegraph Co. v. Eyser*, 19 Wall. 419; *Sage v. Central Railroad*, 93 U. S. 412-417; *Kitchen v. Randolph*, 93 U. S. 86; *Cambuston v. United States*, 95 U. S. 285.

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FORREST v. EDWIN FORREST HOME and others.\*

(Circuit Court, S. D. New York. March 8, 1880.)

REMOVAL OF CAUSE—ACT MARCH 3, 1875.—In the state of New York a cause cannot be removed under the act of March 3, 1875, after the expiration of the term in which the same could have been noticed for trial, under the provisions of the New York Code.

Motion to remand cause to the state court.

*John Townshend*, for plaintiff.

*Robert W. De Forest*, for defendant.

BLATCHFORD, J. This is an action of ejectment, brought in the supreme court of New York, to recover possession of a piece of land in the city of Yonkers. The complaint put in the state court alleges seizure and possession in fee by the plaintiff, and ejection of the plaintiff, and withholding of possession from him by defendants; and demands judgment that the plaintiff has an estate in fee in the premises, and that he recover possession thereof, and his damages for the withholding thereof. The Edwin Forrest Home answered, denying the allegations of the complaint. The other two defendants did not appear, or answer, and are in default for want of an answer on the twenty-third of January, 1878. The answer of the Edwin Forrest Home was put in on that day. The cause was at issue as to the Edwin Forrest Home on that day.

Subsequently and on the ninth of December, 1879, the Edwin Forrest Home filed in the state court a petition set-

\*See *Blackwell v. Braun*, ante, 351

ting forth, among other things, that the plaintiff was at the commencement of the suit and is a citizen of the state of Massachusetts, and that the Edwin Forrest Home was at the commencement of the suit and is a corporation created by the state of Pennsylvania and a citizen of that state; that "this is a suit in which there can be a full and final determination of the controversy between the plaintiff and your petitioners, the Edwin Forrest Home, without the presence of the other defendants as parties in the cause;" that the defendants Keeler and Lawrence were, at the commencement of the suit, and are both of them, citizens of the state of New York; that both of them are in default for not answering the complaint; and that the petition "is made and presented before or at the term at which said cause could first be tried, and before the trial thereof."

The prayer of the petition is that the suit, "so far as concerns your petitioners, the said the Edwin Forrest Home, be removed into the circuit court of the United States for the southern district of New York."

On the petition, and a bond, the state court entered an order, on the ninth of December, 1879, accepting the petition and the bond, and ordering "that this action, so far as concerns the said defendant, the Edwin Forrest Home, be and the same hereby is removed for trial from this court into the next circuit court of the United States, to be held in and for the southern district of New York, in the second circuit, and that this court proceed no further therein."

The removal in this case is not one provided for by subdivision 2 of § 639 of the Revised Statutes of the United States, because the plaintiff is not a citizen of New York. The removal must, therefore, be upheld, if at all, under the act of March 3, 1875, (18 U. S. St. at Large, 470.)

The plaintiff moves to remand the cause to the state court, on the ground that the removal was not applied for in time, under section 3 of the act of 1875, which requires that the application shall be made "before or at the time at which said cause could be first tried, and before the trial thereof."

It is provided, by section 977 of the Code of Procedure of

New York, that "at any time after the joinder of issue, and at least 14 days before the commencement of the term, either party may serve a notice of trial; that at least 12 days before the commencement of the term the party serving the notice must file with the clerk a writ of issue; and that the clerk must thereupon enter the cause upon the calendar according to the date of the issue."

It is provided, by section 980 of the same code, that either party who has served the notice may bring the issue to trial, and proceed in the absence of the adverse party. The place of trial of this action was the county of Westchester, and the place of trial of the issue in it was a circuit court to be held in that county. The plaintiff shows that after the joining of such issue, and prior to such order for removal, circuit courts were held in said county of Westchester, commencing, one March 3, 1878, one June 3, 1878, one September 16, 1878, one December 9, 1878, one March 3, 1879, one June 2, 1879, and one September 15, 1879.

The defendant shows that since issue was joined the plaintiff has procured seven commissions to six different places to examine witnesses, the last of which was procured November 12, 1879; that none of them have been returned; that the suit was noticed for trial for the first time for a term of court commencing December 15, 1879; and that it was never before noticed for trial or placed on the calendar of the court for trial.

The plaintiff contends that as either party could have noticed the cause for trial at any one of the terms named, and as there was no legal obstacle to the noticing of the cause by the defendant, and no stay of proceedings in the orders for commissions, or otherwise, the removal is too late. The defendant contends that as the cause could not be tried, under the statute of New York, until it was in fact noticed for trial and placed upon the calendar, the removal was in time.

The defendant cites the case of *Warner v. The Pennsylvania R. Co.* 13 Blatch. C. C. R. 231. But in that case there were stays of proceedings which prevented a trial. In *Pettilon v. Noble*, 7 Bissell, 449, cited by the defendant, it would appear

that the issue was not a triable issue, after the reversal, until the defendant had notice that the plaintiff desired the issue to be reinstated as a triable issue. This is a different provision from that of the Code of New York.

The intent of the act of 1875 is plainly to require prompt action on the part of a party desiring to remove a cause. Under the act of September 24, 1798, § 12, (1 U. S. St. at Large, 79,) as embodied in section 639 of the Revised Statutes, it was necessary to apply for the removal at the time of entering an appearance in the state court. Under the acts of July 27, 1866, and March 2, 1867, (14 U. S. St. at Large, 306, 558,) as embodied in the same section of the Revised Statutes, the application could be made at any time before the trial or final hearing of the suit. Under the act of 1875 the application must be made, not only before the trial of the cause, but before or at the term at which it "could be first tried."

In *Knowlton v. Congress & Empire Spring Co.* 13 Blatch. Circuit Court Rep. 170, the plaintiff removed the cause, and the defendants moved to remand it. It was held that where either party could notice the cause for trial at a term, that term must be considered the term at which the cause could be first tried.

In *Stough v. Hatch*, 8 Reporter, 7, the cause was noticed for trial by the plaintiff, and placed on the calendar, but not tried, both parties having consented that it go off for the term. The defendant then removed it, and the plaintiff moved to remand it. The motion was granted, on the ground that the term in question was the term at which the cause could be first tried, and that the want of preparation of the parties, and their consent, could not affect the question. A practically mutual consent not to put a cause on the calendar would seem to amount to the same thing as a consent to have a cause go over the term.

In *Gurnee v. The County of Brunswick*, 1 Hughes, 270, 271, Chief Justice Waite says, in reference to the statute in question: "A cause cannot be tried until in some form an issue has been made up for trial. The pleadings or statements

necessary to make the issue are regulated by the practice in the court where the trial is to be had. As soon as the issue is made up the cause is ready for trial. The parties and the court may not be ready, but the cause is. The first term, therefore, at which a case can be tried is the first term at which there is an issue for trial. An application for removal, to be in time, must be made before or at this term."

In *Ames v. Colorado Central R. Co.* 4 Dillon, 260, 263, it is said that the term referred to in the act of 1875 "appears to be that at which the cause may be heard or tried on the merits, according to the practice of the court, without reference to the special circumstances of the case, as whether the parties are ready for trial, and the like." In *Fulton v. Golden*, 9 Central Law Journal, 286, it was held that a removal was too late, where an equity cause being at issue, on answer and replication, and the practice allowing either party to notice it and bring it to hearing, and where under the practice the testimony could have been taken, and the cause noticed for hearing in eight months from the issue, neither party had moved in it, and eight terms had elapsed before the petition for removal was filed.

Although the plaintiff in the present case did not notice the case for trial at an earlier term, the defendant could have done so. The plaintiff had a right to regard the defendant as having waived his right to remove the cause, when, in the absence of any stay, the defendant did not remove the cause before or at the first term at which the cause, being at issue and triable on the merits, the defendant might have noticed it for trial. The proper construction of the statute is such as to make it necessary to hold that the removal in this case was too late.

Points are raised by the plaintiff as to the value of the land sued for, and as to whether the petition for removal, not being framed to remove the whole suit, is of any avail under the act of 1875, and as to whether the petition makes out a case for removal under the acts of 1875, and as to whether the suit is not removable, in whole or in part, on the petition of

the petitioning defendant alone under the act. It is not necessary to pass on those points.

The motion to remand is granted.

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IN RE GROOME.

(*District Court, W. D. Pennsylvania.* March 20, 1880.)

**BANKRUPTCY—SCHEDULE CREDITOR—FAILURE TO RECEIVE NOTICE OF ADJUDICATION—RETURN OF SERVICE UPON THE WARRANT IN BANKRUPTCY.**—An adjudication in bankruptcy will not be set aside more than one year and nine months after the filing of the bankrupt's petition, upon the application of a schedule creditor, on the ground that such creditor had not received notice of the adjudication, and, as far as he was able to learn, no such notice had been mailed or otherwise sent to him, in the absence of an averment of want of actual knowledge of such adjudication at or near the date thereof, where the return of the marshal to the warrant in bankruptcy showed due service of the notice of adjudication upon the moving creditor.

**SAME—ALLEGATION OF RESIDENCE—AMENDMENT.**—The averment of such moving creditor that, at the time of the filing of the petition in bankruptcy and at the time of the said adjudication, the bankrupt was not a resident of or doing business in the judicial district where the bankruptcy proceedings were instituted, does not traverse the allegation of the petitioning bankrupt that he has carried on business in said judicial district for the six months next immediately preceding the filing of his petition, nor will such creditor be permitted to amend his petition in this respect.

**SAME—EXAMINATION OF BANKRUPT—CREDITOR WITH PROVABLE DEBT.**—A creditor who has a provable debt has a right to examine the bankrupt, upon an application for a discharge, although such debt has not been in fact proved.

In Bankruptcy. *Sur* rule upon petition of William T. Carter to show cause why the adjudication in bankruptcy should not be set aside, etc.

ACHESON, J. On the ninth day of February, 1880, William T. Carter, a creditor of Samuel W. Groome, the bankrupt, presented his petition, in which, after averring that it was the duty of the said Groome to cause notice of his adjudication in bankruptcy to be served on the petitioner through the marshal, he alleges that "no such notice, however, was

received by the petitioner, nor, as far as he has been able to learn, was any such mailed or otherwise sent to him, although the residence of the petitioner was well known to said Samuel W. Groome at and before the presentation of the said Groome's petition in bankruptcy." The petition then proceeds in these words: "Your petitioner further shows that at the time of the filing of the said petition in bankruptcy, and at the time of the adjudication aforesaid, the said Samuel W. Groome was not a resident of or doing business in the western district of Pennsylvania, but was residing, and had a long time prior thereto resided, at Philadelphia, in the eastern district, and carried on any business in which he may have been engaged in that city. Your petitioner, therefore, is advised and avers that the presentation of said petition in bankruptcy and the adjudication thereon were irregular and void, inasmuch as this honorable court had no jurisdiction to take cognizance of said petition, for the reason that the said petitioner was neither a resident of nor carrying on business in the district in which the same was presented."

The prayer of the petition is that the said adjudication may be declared null and void, and wholly vacated and set aside.

Upon the presentation of this petition a rule was obtained upon the bankrupt to show cause why the prayer thereof should not be granted. At the return of the rule on March 6, 1880, the bankrupt filed an answer, and at the same time moved the court to dismiss Carter's petition, which motion was argued by the counsel of the respective parties. Other motions were made and argued at the same time, but the motion to dismiss Mr. Carter's petition is to be first considered and disposed of.

Samuel W. Groome filed his petition in bankruptcy on the twenty-seventh day of April, 1878. He therein states his residence to be the city of Philadelphia, but alleges that he has carried on business in the western district of Pennsylvania, at Williamsport, for six months next immediately preceding the filing of his petition. Upon the face of the petition



appear all the averments necessary to give this court jurisdiction, and, accordingly, the petitioner was adjudged a bankrupt May 2, 1878. In his schedule of creditors, which contains the names of 35 in all, the name of Wm. T. Carter appears as a creditor, to the amount of \$86,390.32, and his place of residence is there stated to be Philadelphia, Pa.

The marshal's return to the warrant in bankruptcy shows due service upon Carter of notice of the adjudication, and that the first meeting of creditors to prove their debts and choose an assignee was called for June 19, 1878, at Williamsport.

The creditors having elected H. H. McCormick assignee, an assignment of the bankrupt's estate was executed to him June 22, 1878. On January 30, 1880, upon the bankrupt's petition for his discharge, the usual order was made referring the case to Register Smith, and fixing the hearing to show cause, etc., for February 28, 1880. At this meeting, Mr. Carter's counsel, George T. Bispham, Esq., appeared before the register and demanded permission to examine the bankrupt, who was also present. The bankrupt declining to submit to such examination, the register, at the request of Mr. Bispham, continued the meeting until March 30, 1880. Mr. Carter has not proved his debt against the estate of the bankrupt.

The facts above recited are all matters of record, and a statement of them is necessary to indicate the present *status* of the case, and to show the propriety of the action of the court in respect to Mr. Carter's petition.

As already observed, upon the face of Groome's petition this court had undoubted jurisdiction of the case. The petition was filed so long ago as April 27, 1878; the adjudication was made five days later, and the case proceeded in its regular course for a period of more than one year and nine months before the jurisdiction of the court was called in question. At this late day, and at this stage of the proceedings, can William T. Carter raise the question of jurisdiction in this way, viz., by petition to annul the proceedings *ab initio*? And does his petition present such a case as requires the court

to vacate the adjudication, and make null and void everything that has been done thereunder?

The bankrupt's schedule of creditors and the marshal's return to the warrant in bankruptcy conclusively show that the bankrupt himself did all that was incumbent on him to secure proper service upon Carter of notice of the adjudication. The petition of the latter simply alleges that "no such notice was received by him, nor, as far as he has been able to learn, was any such mailed or otherwise sent to him." This can scarcely be considered a sufficient traverse of the marshal's return. But, however this may be, the petition does not aver that Carter did not in fact know of the adjudication. Coming into court at this late day to overturn this whole proceeding, it was not sufficient for him, I think, to allege merely that he did not receive notice through the marshal. He should have gone further and alleged (if the fact were so) that he had no knowledge of the adjudication at or near the date thereof, and stated when he first acquired such knowledge. In the absence of a denial by Carter of actual knowledge, I think it may fairly be imputed to him.

Now, in considering the application of the petitioning creditor in this case, it must be remembered that want of jurisdiction is not apparent on this record, and that other parties besides the bankrupt and Carter are interested in the adjudication which the latter seeks to annul. Under such circumstances, it seems to me, a creditor who would contest the jurisdiction in the manner and to the extent now attempted must move with reasonable diligence, and after such a lapse of time as we have here, and at the present stage of the case, he will not be permitted to raise the question by an application to set aside the adjudication. This, I understand, was, in effect, decided *In re Little*, 2 B. R. 294, and is sustained by the rulings in *Smith v. Kernochen*, 7 How. 198, and *Phila. W. & B. R. Co. v. Zuigley*, 21 How. 202, where it was held that, if the court has jurisdiction according to the face of the record, objection to the jurisdiction, on the ground of citizenship, cannot be raised at the trial on the merits after a plea of the general issue.

Again, Carter's petition does not expressly or substantially traverse the averment in the bankrupt's petition that the bankrupt carried on business in the district aforesaid for six months next immediately preceding the filing of this petition. Clearly want of jurisdiction is not sufficiently shown by the averments of Carter's petition. His learned counsel themselves seem to have had doubts on this point, for they have moved the court for leave to amend the petition by inserting the words: "Nor had the said Samuel W. Groome resided or carried on business in the said western district during the six months immediately preceding the time of filing his petition in bankruptcy, nor during any portion of said six months."

I must decline to allow this amendment, and must sustain the motion to dismiss Mr. Carter's petition on two grounds: *First*, for the reason already expressed, I am of opinion that under all the circumstances the question of jurisdiction ought not to be raised by the petitioner in the manner proposed, and at this stage of the case; *second*, I think the object the petitioning creditor has in view may be reached without annulling the adjudication. His real purpose (as I infer from the argument of his counsel) is to prevent the bankrupt's discharge. Now it is entirely competent for him to oppose the discharge on the ground that the court has no jurisdiction of the case, and if this is shown the discharge will be refused. *In re Little*, 2 B. R. 294; *In re Penn*, 3 B. R. 582.

I am now brought to the consideration of another motion made by the counsel of Mr. Carter, viz.: that he be permitted to take part in the examination of the bankrupt before the register in bankruptcy, in any hearing upon the bankrupt's application for his discharge, and that the bankrupt be ordered to attend for such examination before the register upon reasonable notice, and submit to an examination by said Carter or his counsel.

It has been already stated that Carter has not proved his debt against the bankrupt, but this is immaterial. The fact that he has a provable debt is shown by the bankrupt's schedule and otherwise, and is admitted.

I am clearly of opinion that a creditor who has a provable debt has the right to oppose the bankrupt's discharge, and this whether or not he has proved his debt. *In re Sheppard*, 1 B. R. 439; *In re Boutelle*, 2 B. R. 129; *In re Murdock*, 3 B. R. 146; Bump (10th Ed.) 273-4.

The bankrupt's counsel insists that the order asked for is too broad, but I do not think so. I am of opinion that Mr. Carter has the right to examine the bankrupt in respect to any matters, whether jurisdictional or otherwise, which touch the question of the bankrupt's discharge, as fully as any creditor who may have proved his debt.

And now, to-wit, March 20, 1880, upon due consideration, leave to amend the petition of William T. Carter is refused, the said petition is dismissed, and the rule granted thereon, upon Samuel W. Groome, to show cause why his adjudication in bankruptcy should not be vacated and set aside, is discharged.

It is further ordered that the said William T. Carter, who is shown to be a creditor of the said bankrupt, and having a provable debt, have leave to take part in the examination of said bankrupt, before the register in bankruptcy, in any hearing upon said bankrupt's application for his discharge; and said bankrupt is required, upon reasonable notice, to attend such examination before said register, and to submit to an examination by said Carter, or his counsel, in respect to all matters, whether jurisdictional or otherwise, which touch the question of the bankrupt's discharge.

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BOHLER, HUSE & Co. v. TAPPAN.

(District Court, E. D. Arkansas. — 1880

**PARTNERSHIP—SOLE SURVIVING PARTNER—PLEDGE OF PERSONAL PROPERTY FOR PARTNERSHIP DEBT.**—A sole surviving partner may transfer the choses in action and other personal effects of the partnership, by way of pledge or mortgage, to secure a partnership debt, and when such transfer is made in good faith it is effectual against all the other creditors, as well as the representatives of the deceased partner.

Burnett & Turner were partners in the business of keeping a wharf-boat at Helena. The firm owned a wharf-boat, which was purchased and used for partnership purposes, and was partnership property. This wharf-boat was purchased from Johnson, partially or wholly upon credit. Burnett, one of the partners, died before the wharf-boat was paid for, and after his death, and on the twenty-fifth day of April, 1879, Turner, as surviving member of the firm of Burnett & Turner, transferred the wharf-boat, by deed of trust in the nature of a mortgage, to Tappan, to secure the payment to Johnson of the balance of the purchase money. The deed of trust was duly acknowledged and recorded on the twenty-fifth of April, 1879.

On the twelfth of March, 1879, Bohler, Huse & Co. recovered a judgment against Burnett & Turner, in the United States district court, at Helena, for \$1,399.78, and costs. On the twenty-sixth day of April execution was issued on this judgment, and on the thirtieth day of the same month the writ came to the hands of the marshal, and was levied on this same wharf-boat. By agreement the boat was sold, and the proceeds paid into the registry until it should be determined whether the plaintiffs in the execution, or the beneficiary under the deed of trust, was entitled thereto.

*Thwealt & Quarles*, for plaintiffs.

*Tappan & Horner*, for defendant.

CALDWELL, J. The precise question in this case, on the agreed facts, is whether a sole surviving partner can make a valid transfer by deed of trust in the nature of a mortgage of personal property, belonging to the partnership, to secure the payment of a partnership debt.

During the continuance of a partnership one partner may transfer personal property by way of mortgage as security for a partnership debt. *Milton v. Mosher*, 7 Met. 244; *Patch v. Wheatland*, 8 Allen, 102; *Anderson v. Tompkins*, 1 Brock. (Marshall's Decs.) 456; *Harrison v. Sterry*, 5 Cranch, 289.

On the dissolution of partnership by the death of one copartner, the right to the possession and control of the partnership effects vests in the survivor, for the purpose of settling up the

partnership affairs. He has the legal title to the assets, and the exclusive right of disposing of the property, and of collecting and paying the partnership debts. *Stearns v. Houghton*, 38 Vt. 583; *Roys v. Vilas*, 18 Wis. 179; *Pinckney v. Wallace*, 1 Ab. Pr. 82; *Barry v. Briggs*, 22 Mich. 201.

And the right and power of the sole surviving partner to dispose of the partnership effects, in settlement of the partnership business, is not limited to the right to make an absolute sale of the same, but he may transfer the choses in action and other personal property, by way of pledge or mortgage, to secure a partnership debt; and, when such transfer is made in good faith, it is effectual against all other creditors, as well as the representatives of the deceased partner. *Lorillard v. Lorillard*, 4 Abb. Pr. (N. Y.) 210; *Hitchcock v. St. John*, 1 Hoff. Ch. 511; *Wilson v. Soper*, 13 B. Mon. 411.

No fraud is charged or proven. The case turns on the question of the power of a sole surviving partner, acting in good faith, to secure a partnership debt by giving a mortgage or other lien on personal property. His right to do so is not open to serious question.

The lien of the deed of trust is prior in point of time, and therefore paramount to the lien of the execution; and the money arising from the sale of the wharf-boat must be paid to the beneficiary under the deed of trust.

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### EHRMAN v. TEUTONIA INS. Co.

(District Court, E. D. Arkansas. ———, 1880.)

#### PLEADING—WANT OF JURISDICTION—OBJECTION TAKEN BY ANSWER.—

The Arkansas Code abolishes pleas in abatement, and in that state there is no difference in the method of pleading matter in abatement and matter in bar; and where a want of jurisdiction over the person is not disclosed upon the face of the complaint the objection may be taken by answer.

**SAME—MATTER IN ABATEMENT—HOW PLEADED.**—Matter in abatement must be pleaded with exactness, and ought to be certain to every intent.

**INSURANCE COMPANIES—NON-COMPLIANCE WITH STATUTE OF STATE—VALIDITY OF POLICIES.**—By failing to comply with the requirements of the Arkansas statute, prescribing the terms upon which insurance companies of other states may do business in that state, such companies and their agents and brokers render themselves liable to the penalties denounced by the act, but such failure does not affect the validity of the policies issued by them, or in any manner operate to the prejudice of the policy holder.

**SAME—SUIT ON POLICY—PROCESS—SERVICE ON STATE AUDITOR—ESTOPPEL.**—A statute of Arkansas provides that no insurance company, not of that state, shall do business in the state until it has filed with the auditor a stipulation in writing agreeing that legal process affecting the company, served on the auditor of state, shall have the same effect as if served personally on the company. *Held*, that if an insurance company does business in the state, and issues policies to citizens of the state on property within the state, that in a suit on such a policy service of process on the auditor was good personal service on the company, although the written stipulation to that effect was not filed with the auditor; that in such case the company was estopped to say that it had not filed the stipulation and had not assented to such service.

This action was brought to recover for an alleged loss on a fire policy. The complaint alleged the plaintiff was a citizen of the state of Arkansas, and that the defendant was a corporation created by the laws of the state of Louisiana and a citizen of that state "doing business and taking risks of insurance in the state of Arkansas," and that plaintiff paid the premium and the defendant issued to him the policy in suit. The property insured was then contained and during the life of the policy was to be kept in a building situated in the city of Helena, Arkansas, and that the loss occurred there. Summons was issued and duly served on the auditor of state, under section 3561 of Gantt's Digest, as amended by act of February 27, 1875.

The defendant entered a special appearance, and filed the following plea, not sworn to: "Now, on this day comes the defendant, the Teutonic Insurance Company, and, without entering their appearance herein, say, by way of abatement of the writ in this behalf, that they never had any agent in this state; they never had any certificate of authority, as provided for by the act of February 27, 1875; that they never, in any manner, complied with the laws of the state of Arkansas providing for the duties and liabilities of foreign insurance com-

panies doing business in this state, known as the act of February 27, 1875; that service of process upon the auditor of the state of Arkansas is no service upon them, and that they are not bound by the same. Wherefore, they pray judgment, and that said writ be abated."

Plaintiff demurred to the plea.

*Tappan & Horner*, for plaintiff.

*Palmer & Nichols*, for defendant.

CALDWELL, J. Under the Code of this state there is no difference in the method of pleading matter in abatement and matter in bar. Pleas in abatement are abolished, and where a want of jurisdiction over the person or subject of the action is not disclosed upon the face of the complaint the objection may be taken by answer. Gantt's Digest, § 4567; Pomeroy on Remedies, §§ 697, 698, 721; Bliss' Pleadings, § 345. Where other defences are embraced in the answer the court will put the issues to the jury in such a way as to elicit their verdict on the matter in abatement specifically, and where the finding on that issue makes it necessary to do so, will see that the proper judgment in abatement is rendered. *Id.*

That the paper filed is not technically in the form of an answer, under the Code, and is not verified, are not objections that the court will notice on demurrer. But the rule of pleadings remains, that matter in abatement must be pleaded with exactness, and ought to be certain to every intent. Under this rule none of the allegations of the answer are good. It may be true that the company never had any agent in this state, and yet the contract may have been made in this state by the president or other officer of the company, or by a broker, acting for the company; and the second allegation is disposed of by the observation that the act of February 27, 1875, upon which the pleader in terms rests his plea, is not the act under which the company is required to do these things.

The averments in the plea may all be true, and yet the company may have complied with all the requirements of the act of April 25, 1873, (sections 3540-3565, Gantt's Digest,) which is the act prescribing the duties of foreign



insurance companies doing business in this state. The act of 1875 simply devolves on the auditor of state the duties imposed by the act of 1873 on the insurance commissioner; and the allegation that service on the auditor is not service on the company is bad, because it does not show why it is not good service. Service on the auditor may be good personal service on foreign companies doing business in this state, and the plea does not deny the existence of facts that would make such service good on this company.

It does not deny that the company transacted business and issued the policy in suit in this state; but, waiving the technical objections to the plea capable of amendment, we come to the important point intended to be raised by the pleader, viz.: Whether, on the admitted facts on the record, service on the auditor of state is good service on the company.

Every material allegation in the complaint not denied by the answer is admitted.

As the record stands the defendant admits that the plaintiff is a citizen of this state; that the defendant is an insurance company of another state, doing business and taking risks of insurance in this state; that the plaintiff paid the premium, and the defendant issued to him the policy in suit; that the property insured was in this state, and was, by the terms of the policy, to be kept here during the life of the policy, and that the loss occurred in this state. In the face of these admissions can the company be heard to say that service of the summons on the auditor is not good personal service on the company?

The insurance act of this state declares it shall be "unlawful for insurance companies to do business in this state without complying with its provisions, (section 3555,) and the act, among other things, requires them to make certain reports to the auditor of state disclosing their financial condition; and foreign companies are required to pay into the state treasury 3 per cent of the amount of their premiums received for policies issued in this state, and such companies, their agents or brokers, transacting or soliciting business without having

received authority agreeably to the provisions of the act, are subject to a penalty of \$500 for each month or fraction thereof during which such illegal business is transacted." Section 3562.

The objects sought to be obtained by this act are security and protection to policy-holders, and revenue to the state, but chiefly the former. By failing to comply with the requirements of the act the companies, and their agents and brokers, render themselves liable to the penalties denounced by the act, but such failure does not affect the validity of the policies issued by them, or in any manner operate to the prejudice of the policy-holders. *Union Mutual Ins. Co. v. McMillen*, 24 Ohio, St. 67; *Clay Fire Ins. Co. v. Huron Salt Co.* 31 Mich. 346; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Lamb v. Bowser*, 7 Bissell, 315; S. C. Id. 372; *Hartford Live Stock Ins. Co. v. Mathews*, 102 Mass. 221.

The leading provision for the protection of the policy-holder is contained in section 3561. This section is a literal copy of the Pennsylvania statute. See *Ex parte Schollenberger*, 96 U. S. 369-374, where it is set forth at length in the opinion of the court. So much of it as is material to this case reads as follows: "No insurance company, not of this state, nor its agents, shall do business in this state until it has filed with the auditor of state of this state a written stipulation, duly authenticated by the company, agreeing that any legal process affecting the company, served on the auditor of state, or the party designated by him, or the agent specified by said company to receive service of process for the company, shall have the same effect as if served personally on the company within this state."

The supreme court of the United States, speaking of a similar provision in a statute of Ohio, say: "We find nothing in this provision either unreasonable in itself or in conflict with any principle of public law. It cannot be deemed unreasonable that the state of Ohio should endeavor to secure its citizens a remedy, in their domestic forum, upon this important class of contracts made and to be performed within that state and fully subject to its laws; nor that proper means should

be used to compel foreign corporations, transacting this business of insurance within the state for their benefit and profit, to answer there for the breach of their contracts of insurance there made and to be performed." *Lafayette Ins. Co. v. French et al.* 18 How. 404.

And in a later case the court say that if there could be no legal redress short of the seat of the company in another state, the cost of the remedy would in most instances exceed the value of its fruits, and the result would be, to a large extent, immunity from all legal responsibility. *Railroad Co. v. Harris*, 12 Wall. 65.

By the provisions of section 3561 every insurance company of another state is required to stipulate in terms that service on the auditor shall be service on the company. If the stipulation is filed service may be on the auditor, or the person designated by him, or the agent designated by the company, at the election of the plaintiff. *Cunningham v. Southern Express Co.* 67 N. C. 425. And if the auditor does not designate a party, and the company does not specify an agent, then the auditor alone is the proper person to serve with the process, and such service binds the company.

The citizen insuring his property in this state is not required to search the files of the auditor's office for the purpose of ascertaining whether the company has filed the required stipulation, and otherwise complied with the statute. The receipt of the premium and the execution and delivery of the policy by the company, are equivalent to an assertion by the company that it has complied with the requirements of the statute to entitle it to do business in the state, and, as between the assured and the company, the latter is estopped, upon the soundest principles of the law and morals, to say that it has not done so.

That the stipulation was not, in fact, filed with the auditor, is of no consequence if the company has done those things which imposed upon it the obligation and duty to file it.

The law deduces the agreement on the part of the company to answer in the courts of this state, on service made upon the

auditor, from the fact of its doing business in the state; and the presumption, from that fact, of assent to service in the mode prescribed by the statute, is conclusive, and no averment or evidence to the contrary is admissible to defeat the jurisdiction. The reason of this rule is that the obligation to file the stipulation is imposed for the protection of the citizen dealing with the company, and when, by its own act, its obligation to file the stipulation is perfect, as between the company and the citizen, the company will not be permitted to relieve itself from a liability which the written stipulation would have imposed by pleading its own fraud on the law of the state and her citizens. In such cases the law conclusively presumes that to have been done which law and duty and the rights of the party contracting with the company required to be done. It is a familiar principle that jurisdiction cannot be acquired by fraud, nor can it be evaded by such a fraud as is here attempted to be set up.

The maxim that no man shall take advantage of his own wrong is as applicable to corporations as to natural persons, and applies as well to the kind of agreement under consideration as to any other.

Insurance companies incorporated by the laws of one state have no absolute right to do business in another state, without the consent, express or implied, of the latter state.

This consent may be given on such terms as the state may think fit to impose, and these conditions are binding on the company, and effect will be given to them in the courts of all the states and the United States. *Lafayette Ins. Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168.

"One of these conditions may be that it shall consent to be sued there. If it do business there, it will be presumed to have assented and will be bound accordingly." *Railroad Co. v. Harris*, 12 Wall. 65.

The principle established in the case last cited has been affirmed in later cases. *Railway Co. v. Whitton*, 13 Wall. 270, 285; *Ex parte Schollenberger*, 96 U. S. 369; and see *Hayden v. Androscoggin Mills*, 9 Rep. 270; *Albright v. Em-*

*pire Pr. Co.* 18 Albany L. J. 313; S. C. 6 Rep. 673; *Wilson Packing Co. v. Hunter*, 7 Rep. 455.

Upon the admitted facts of this case service upon the auditor was good personal service on the company, and it must appear, or suffer a judgment by default.

Demurrer sustained.

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### MCCARTHY v. EGGERS.

(Circuit Court, E. D. New York. February 18, 1880.)

OWNERSHIP OF VESSEL—ACTION IN PERSONAM FOR REPAIRS.—Where E., a married woman, furnished money to a firm of ship-brokers for the purchase of a vessel, under an agreement that they were to manage and charter her, and if the money was not repaid at a certain time the vessel was to be the property of E., and a carpenter brought suit *in personam* against E. for a bill of repairs made upon order of the brokers, without any knowledge by him at the time that they were not the legal and sole owners, and the district court had held that the agreement was not proved so as to make the brokers liable as owners, upon appeal to the circuit court and further evidence taken, *held*, that the defence set up was established, and the brokers were the owners *pro hac vice*.

*Edw. C. S. Hubbe*, for plaintiff.

*Henry D. Hotchkiss*, for defendant.

BLATCHFORD, J. The district court rendered a decree in favor of the libellant on the ground that he was entitled to a decree unless the respondent had proved the defence set up, which defence that court stated to be that the vessel, at the time of the repairs, was under charter to Dill & Radman, by virtue of an agreement between that firm and the respondent whereby Dill & Radman became owners *pro hac vice*, and, therefore, alone responsible for the repairs sued for. The district court came to the conclusion that, as matter of fact, the respondent had failed to establish such defence.

On the evidence below, in connection with the further evidence taken in this court on the part of the respondent, I am of the opinion that the agreement set up in the answer is proved, and the defence is established.

The libel must be dismissed, with costs to the respondent in both courts.

## PENROSE v. PENROSE.

(Circuit Court, E. D. New York. March 26, 1880.)

**REMOVAL OF CAUSES—COSTS IN STATE COURT—STAY OF PROCEEDINGS—JURISDICTION.**—A state court is without jurisdiction to award costs in an action, or to make any order whatever, after the cause is duly removed to the U. S. circuit court. A motion for stay of proceedings in this court, because costs so awarded without jurisdiction have not been paid, denied.

*H. C. Place*, for plaintiff.

*Pertsham & Tyler*, for defendant.

BENEDICT, J. This cause was removed to this court by filing of the papers required by law. After the requisite papers had been filed in this court, and the jurisdiction of the court over the cause had attached, the defendant obtained from the state court an order directing the removal of the cause to this court, and awarding him \$10 costs of the motion. From this order the plaintiff appealed to the general term of the state court, where the order appealed from was affirmed, and costs again awarded to the defendant. These costs not having been paid, the defendant now moves this court for a stay of proceedings until the costs so awarded be paid.

The motion cannot be granted, for the reason that the state court was without jurisdiction to award the costs in question. Upon the filing of the petition and bond the state court could proceed no further with the cause. An order of the state court directing the removal of the cause, if made, and an order refusing the removal, would be equally without effect. The power of the state court to make any order whatever was gone, and, by necessary consequence, its award of costs against the plaintiff was void. *Mayor v. Cooper*, 6 Wall. 250.

The motion is denied.

## DEMOND v. CRARY.

(Circuit Court, E. D. New York. March 26, 1880.)

**PLEA IN ABATEMENT—PRIOR ACTION PENDING—COUNTER CLAIM.**—An action wherein defendant had set up a counter claim was removed from the state court to the U. S. circuit court. Subsequently another action, begun by the defendant in the first suit against the plaintiff, was also removed to the U. S. circuit court, and noticed for trial. At the time of the hearing in the second action a motion was granted in the first action, and an order made, permitting the withdrawal of the counter claim. *Held*, that such an order, under the circumstances, did not defeat the plea in abatement in the second action of another action pending between the same parties.

*Jesse Johnson*, for plaintiff.

*S. W. Holcombe*, for defendant.

BENEDICT, J. The counter claim made in the prior action and set up in the plea in abatement, is, in legal effect, an action by the plaintiff against this defendant. *Fettretch v. McKay*, 47 N. Y. 426. Being for the same cause of action as the present suit, it was properly pleaded in abatement and constitutes a good defence. *Ins. Co. v. Brune's Assignee*, 96 U. S. (6 Otto) 592.

The order permitting the withdrawal of the counter claim in the former action, obtained since the issue was perfected in this suit, and after the same had been noticed for trial by the plaintiff upon the issues tendered by the plea—which order, of course, is not set up in the pleadings, having been obtained since the commencement of the term at which the cause was noticed for trial—is not sufficient to defeat the plea. The defendant is entitled to judgment dismissing the complaint.

*In re* TIBURCIO PARROTT.*(Circuit Court, D. California. March, 1880.)*

**TREATY-MAKING POWER.**—Under section 10, art. 1, of the constitution of the United States, and section 2, art. 2, the treaty-making power has been surrendered by the states to the national government, and vested in the president and senate of the United States.

**TREATIES—EFFECT OF.**—Under article 1, the constitution of the United States and laws made in pursuance thereof, and treaties made under its authority, are the supreme law of the land; and the judges in every state, both state and national, are bound thereby, anything in the *constitution or laws* of any state to the contrary notwithstanding.

**CHINESE TREATY WITHIN TREATY-MAKING POWER.**—The provisions of articles 5 and 6 of the treaty with China of June 18, 1868, recognizing the right of the citizens of China to emigrate to the United States for purposes of curiosity, trade and permanent residence, and providing that Chinese subjects residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel and residence as may be enjoyed by the citizens or subjects of the most favored nations, (16 Stat. 740,) are within the treaty-making power conferred by the constitution upon the president and senate, and are valid, and constitute a part of the supreme law of the land.

**CONSTITUTION OF CALIFORNIA—TREATY.**—Any provision of the constitution or laws of California in conflict with the treaty with China is void.

**SECTION 2 OF ART. 19 OF THE CONSTITUTION OF CALIFORNIA**, providing that no corporation formed under the laws of the state shall, directly or indirectly, in any capacity, employ any Chinese or Mongolian, and requiring the legislature to pass such laws as may be necessary to enforce the provision, is in conflict with articles 5 and 6 of said treaty with China, and is void.

**ACT MAKING IT AN OFFENCE TO EMPLOY CHINESE.**—The act of February 13, 1880, to enforce said article of the constitution making it an offence for any officer, director, agent, etc., of a corporation to employ Chinese violates the treaty with China, and is void.

**THE PRIVILEGES AND IMMUNITIES** which, under the treaty, the Chinese are entitled to enjoy to the same extent as enjoyed by the subjects of the most favored nation, are all those rights which are fundamental, and of right belong to citizens of all free governments; and among them is the right to labor, and to pursue any lawful employment in a lawful manner.

**LABOR—PROPERTY.**—Property is everything which has an exchangeable value. Labor is property, and the right to make it available is next in importance to the right to life and liberty.



**FOURTEENTH AMENDMENT TO NATIONAL CONSTITUTION.**—The provisions of article 19 of the constitution of California, and said act of the legislature passed to enforce it, prohibiting the employment of Chinese, are also in conflict with the provisions of the fourteenth amendment to the constitution of the United States, and are void on that ground.

**SAME.**—Said provisions are in conflict with that part of the said fourteenth amendment which provides that no state shall deprive any person of life, liberty, or property, without due process of law.

**SAME.**—They are also in conflict with that portion of said amendment which provides that no state shall deprive any person within its jurisdiction of the equal protection of the laws.

**CHINESE OR MONGOLIANS,** residing within the jurisdiction of California, are "persons" within the meaning of the term as used in the said fourteenth amendment to the constitution.

**SECTIONS 1977 AND 1978 OF THE REVISED STATUTES OF THE UNITED STATES** were passed in pursuance of said fourteenth amendment, and to give it effect; and said constitutional and statutory provisions of the state of California are in conflict with said provisions of the Revised Statutes.

**DISCRIMINATING LEGISLATION** by a state against any class of persons, or against persons of any particular race or nation, in whatever form it may be expressed, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws, and is prohibited by the fourteenth amendment.

**THIS INHIBITION OF THE FOURTEENTH AMENDMENT UPON A STATE** applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative and judicial departments, and to the subordinate legislative bodies of counties and cities.

**POWER OVER CORPORATIONS.**—Where the state legislation, under its reserved power to alter and repeal charters of corporations, comes in conflict with valid treaty stipulations, and with the constitution of the United States, it is void. -

**SAME.**—Where the policy of state legislation, under its reserved power to alter or repeal charters of corporations, does not have in view the relations of the corporations to the state as the object to be effected, but seeks to reach the Chinese and exclude them from a large field of labor, the ultimate object being to drive them from the state, in violation of their rights under the constitution and treaty stipulations—the discriminating legislation being only the means by which the end is to be attained—the end sought is a violation of the constitution and treaty, and the legislation as such is void.

**UNLAWFUL OBJECT.**—Where the object sought is unlawful, it is unlawful to use any means to accomplish the object.

**UNCONSTITUTIONAL ACT.**—That which cannot be constitutionally done directly, cannot be done indirectly.

SECTION 31, ART. 4, OF THE CONSTITUTION OF CALIFORNIA, which provides that all general laws passed for the formation of private corporations may be altered from time to time, or repealed, does not authorize the legislature to forbid the employment by corporations of persons of a particular class or nationality. *Hoffman*, D. J.

CONSEQUENCES OF A PERSISTENT VIOLATION OF TREATIES BY A STATE DISCUSSED, and attention called to the stringent criminal laws passed by congress to enforce the fourteenth amendment.

*Habeas Corpus.*

*Hall McAllister, Delos Lake and T. I. Bergin*, for petitioner.

*A. L. Hart*, Attorney General; *David L. Smoot*, State District Attorney; *Crittenden Thornton, Davis Louderback and Robert Ash*, for respondent.

HOFFMAN, J. The return in this case shows that the petitioner is imprisoned for an alleged violation of the act of the legislature of this state, approved February 13, 1880.

Article 19, § 2, of the recently adopted constitution of this state is as follows:

"No corporation now existing, or hereafter formed under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as shall be necessary to enforce this provision."

In pursuance of this mandate the legislature enacted the law under which the petitioner has been arrested. It is as follows:

"An act to amend the penal code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations.

*"The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"Section 1. A new section is hereby added to the penal code, to be numbered section 178.

"Sec. 178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employe, assignee, or contractor of any corporation now existing or hereafter formed under the laws of this state, who shall employ, in any

manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is guilty of a misdemeanor, and is punishable by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail of not less than 50 nor more than 500 days, or by both such fine and imprisonment; *provided*, that no director of a corporation shall be deemed guilty under this section who refuses to assent to such employment, and has such dissent recorded in the minutes of the board of directors.

"1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows:

"2. For each subsequent conviction such person shall be fined not less than \$500 nor more than \$5,000, or by imprisonment not less than 200 days nor more than two years, or by both such fine and imprisonment.

"Sec. 2. A new section is hereby added to the penal code, to be known as section 179, to read as follows:

"Sec. 179. Any corporation now existing, or hereafter to be formed under the laws of this state, that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, shall be guilty of a misdemeanor, and, upon conviction thereof, shall, for the first offence, be fined not less than \$500 nor more than \$5,000; and, upon the second conviction, shall, in addition to said penalty, forfeit its charter and franchise, and all its corporate rights and privileges, and it shall be the duty of the attorney general to take the necessary steps to enforce such forfeiture.

"This act shall take effect immediately."

It is claimed on behalf of the petitioner that this provision of the constitution, and the law passed in pursuance of it, are void because in violation of the fourteenth amendment of the constitution of the United States, and the law passed to enforce its provisions known as the civil rights law; and also of the treaty between the United States and the Chinese Empire, commonly called the Burlingame Treaty.

The fourteenth amendment enacts that "no state shall deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The civil rights bill provides that all persons within the jurisdiction of the United States shall have the same rights in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. Rev. St. 1977.

Section 2164 provides that no tax or charge shall be imposed or enforced by any state, upon any person immigrating thereto from a foreign country, which is not equally imposed and enforced upon every person immigrating thereto from a foreign country.

Article 5 of the Burlingame Treaty recognizes "the mutual advantage of the free immigration and emigration of the citizens and subjects" (of the United States and of the Emperor of China) "respectively, from the one country to the other for purposes of curiosity, or trade, or as permanent residents."

Article 6 provides that "reciprocally, Chinese subjects visiting or *residing* in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel, or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."

It was not disputed by the attorney general of California that these provisions of the treaty are within the treaty-making power of the United States, nor that the law under which the petitioner has been arrested, if in violation of those provisions, or those of the fourteenth amendment, or of the civil rights bill, is void, anything in the constitution of the state to the contrary notwithstanding.

But it is urged that the article of the constitution of this state which permits corporations to be formed under general laws, reserves the right to repeal, alter, or amend those laws at the discretion of the legislature; that their repeal would at once put an end to the corporate existence of the corporations, and that the right to put an end to their existence in-

**v**olves the right to prescribe the conditions upon which their existence shall be continued; that this right is theoretically and practically without limit, and may be exercised by imposing upon corporations laws for the conduct of their business, and restrictions upon the use and enjoyment of their property, which would be unconstitutional and void if applied to private persons, and which may have the effect to defeat the object of the association, or to impair or even destroy the beneficial use of its property.

The state may, therefore, in the exercise of this reserved power, prescribe what persons may be employed by corporations organized under its laws, their number, their nationality, perhaps even their creed. It may determine what shall be their age or complexion, their height or their weight, the number of hours they shall work in a day, or the number of days in a week, and the rate of their wages.

These illustrations may seem extravagant, but they were all either recognized by counsel as within the scope of the reserved power, or else they are legitimate examples of the mode in which the reserved power, as claimed, might be exercised. For all such legislation the only remedy of the corporations is to disincorporate and cease to exist.

Such being the reserved power of the state over the creatures of its laws, it is urged that the treaty was not intended, and cannot be construed, to impair that right any more than it could be deemed to abridge the right to enact laws in the interest of the public health, safety, or morals, usually known as police laws, or to regulate the making of contracts by providing who shall be incompetent to make them, as infants, married women, and the like.

When we consider the vast number of corporations which have been formed under the laws of this state, the claim thus put forth is well fitted to startle and alarm. It amounts in effect to a declaration that the corporations formed under the laws of this state, and their stockholders, hold their property, so far as its beneficial use and enjoyment are concerned, at the mercy of the legislature, and that rights which in the case

of private individuals would be inviolable, have for them no existence.

The circumstances which led to the insertion in charters of incorporation of the reservation in question are well known.

The supreme court having decided that a charter of a literary institution was a contract, and therefore protected by the provision in the constitution which forbids the states to make any law impairing the obligation of contracts, the reservation clause was introduced in order to withdraw the contract from the operation of the constitutional inhibition, and to retain to the authority which created the corporation the right to resume the granted powers, or to modify them, as the public interests might require.

It may confidently be affirmed that it was not intended to authorize the exercise of the unrestrained power over the operations of corporations, and the use of their property, contended for at the bar.

The adjudged cases, though they contain no precise definition of the extent and limits of this power applicable to all questions which may arise, are nevertheless full of instruction on the subject.

In *The Sinking Fund Cases*, 9 Otto, 720, Mr. Chief Justice Waite, delivering the opinion of the court, says: "That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made, but, as was said by this court, through Mr. Justice Clifford, in *Miller v. The State*, 15 Wall. 498, 'it may be safely affirmed that the reserved power may be exercised and to almost any extent to carry into effect the original purposes of the grant, or to secure the due administration of its affairs so as to protect the rights of stockholders and of creditors, and for the proper disposition of the assets;' and again, in *Holyoke Company v. Lyman*, Id. 519, 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of a corporation.' Mr. Justice

Field, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup*, Id. 459, he said, 'the reservation affects the entire relation between the state and the corporation, and places under legislative control all *rights, privileges and immunities* derived by its charter directly from the state.' And again, as late as *Railroad Company v. Maine*, 96 U. S. 510, 'by the reservation the state retained the power to alter it (the charter) in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges, and immunities.' Mr. Justice Swayne, in *Shields v. Ohio*, 95 U. S. 324, says, by way of limitation: 'The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.'"

In his dissenting opinion in this case, Mr. Justice Field reproduces and explains the language used by him in *Tomlinson v. Jessup*, and *Railroad Company v. Maine*. He says: "The object of a reservation of this kind, in acts of incorporation, is to insure to government control over corporate franchises, rights and privileges which, in its sovereign or legislative capacity, it may call into existence, not to interfere with contracts which the corporation, created by it, may make. Such is the purport of our language in *Tomlinson v. Jessup*, where we state the object of the reservation to be 'to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference;' and 'that the reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities *derived by its charter directly from the state.*' 5 Wall. 354. The same thing we repeated, with greater distinctness, in *R. Company v. Maine*, where we said that 'by the reservation the state retained the power to alter the act incorporating the company in all particulars *constituting the grant to it of corporate rights, privileges, and immunities;*' and that 'the exist-

ence of the corporation and its franchises and immunities, derived directly from the state, were thus kept under its control.' But we added, 'that the rights and interests acquired by the company, *not constituting a part of the contract of incorporation, stand upon a different footing.*' 96 U. S. 499." (The *Italics* are the learned justice's own.)

In *Commonwealth v. Essex Co.* 13 Gray, (Mass.) 239-253, Mr. Justice Shaw says: "It seems to us that this power must have some limit, though it is difficult to define it. \* \* \* Perhaps from these extreme cases—for extreme case are allowable to test a legal principle—the rule to be extracted is this: that where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property *or rights* which have become vested under a legitimate exercise of the powers granted." Page 253.

"This rule," says Mr. Justice Strong, "has been recognized ever since." 99 U. S. 700-742.

The language of Mr. Justice Story in the Dartmouth College case, which, as before remarked, first led to the general insertion of the reservation clause in charters of incorporation, clearly indicates its object.

"When," he observes, "a private corporation is thus created by the charter of the crown, it is subject to no other control on the part of the crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the crown cannot, in virtue of its prerogative, without the consent of the corporation, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or add to or diminish the number of the trustees, or remove any of the members, or change or control the administration of the funds, or compel the corporation to receive a new charter." 4 Wheat. 675.

"Probably," Mr. Justice Bradley observes, "in view of this somewhat unexpected application of the clause," (forbidding he states to impair the obligation of contracts,) "operating as it did to deprive the states of nearly all legislative control over corporations of their own creation, the courts have



given liberal construction to the reservation of power to alter, amend, and repeal a charter, and have sustained some acts of legislation made under such a reservation, which are at least questionable." 99 U. S. 748.

In *Miller v. The State*, 15 Wall. 498, the supreme court says: "Power to legislate founded upon such a reservation in a charter to a private corporation is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such charter, and which, by a legitimate use of the powers granted, have become vested in the corporation; but it may be safely affirmed that the reserved power may be exercised and to almost any extent to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets. Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use, inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract." *State v. Adams*, 44 Mo. 570; *Zabriskie v. R. Co.* 3 C. E. Green, 178-180; *Sage v. Dillard*, 15 B. Mon. 340-359. These citations sufficiently indicate the nature, object, and, to a certain degree, the extent of the powers reserved in the clause in question; and, although they do not define their limits in every direction, they lay down certain *ne plus ultra* boundaries, which the legislature may not pass.

Over all the rights, privileges and immunities conferred by the charter upon the corporation, and which are derived from the charter, the legislature has control. But, in the language of the supreme court, "the rights and interests acquired by the company, and not constituting a part of the contract of corporation, stand upon a different footing." 96 U. S. 571.

The right to use a corporate name and seal, the right, under that name, to sue and be sued, to acquire property and to contract, are rights which owe their existence to the charter.

But when a contract has been made, or property acquired; by a lawful exercise of the granted powers, the contract is as inviolable, and the right of property, with everything incidental to that right, as sacred, as in the case of natural persons.

It is not merely the title to the property that is protected from legislative confiscation, but that which gives value to all property, the right to its lawful use and enjoyment.

It would be a "mockery, a delusion, and a snare" to say to a corporation: "The title to the property you have lawfully acquired we may not disturb, but we may prescribe such conditions as to its use as will utterly destroy its beneficial value."

It need hardly be said that no reference is here intended to the power of the state to enact police laws—that is, laws to promote the health, safety, or morals of the public. To such laws corporations are amenable to the same extent as natural persons and no further.

The law in question does not affect to be a police law. Its validity, if applied to natural persons, was not contended for at the bar. The authority to pass it was sought to be derived exclusively from the reserved power over corporations.

It forbids the employment of Chinese. If the power to pass it exists, it might equally well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest.

It might, as avowed at the bar, have prescribed a rate of wages, hours of work, or other conditions destructive of the profitable use of the corporate property. Such an exercise of legislative power can only be maintained on the ground that stockholders of corporations have no rights which the legislature is bound to respect. Behind the artificial or ideal being created by the statute and called a corporation, are the corporators—natural persons who have conveyed their property to the corporation, or contributed to it their money, and received, as evidence of their interest, shares in its capital stock. The corporation, though it holds the title, is the

trustee, agent, and representative of the shareholders, who are the real owners. And it seems to me that their right to use and enjoy their property is as secure under constitutional guarantees as are the rights of private persons to the property they may own. That the law in question, substantially and not merely theoretically, violates the constitutional rights of the owners of corporate property, can readily be shown.

Already several corporations representing investments of great magnitude, submitting to its commands, have ceased their operations. It is probable that, if the law be declared valid, many more will be forced to follow their example. It applies to all corporations formed under the laws of this state. If its provisions be enforced, a bank or a railroad company will lose the right to employ a Chinese interpreter to enable it to communicate with Chinese with whom it does business. A hospital association would be unable to employ a Chinese servant to make known or minister to the wants of a Chinese patient; and even a society for the conversion of the heathen would not be allowed to employ a Chinese convert to interpret the gospel to Chinese neophytes.

The language of the supreme court in *Shields v. Ohio*, 95 U. S. 324, has already been quoted: "The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. \* \* \* Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration."

Can it be pretended that this law, of the effect of which I have given these examples, is reasonable as between the state and the corporations, without regard to the treaty rights of Chinese residents. Can it be said to be in good faith—that is, in the fair and just exercise of the reserved power to regulate corporations for the protection of the stockholders, their creditors, and the general public? Is it not rather an attempt, "under the guise of amendment or alteration," to attain quite a different, and, as I shall presently show, an unconstitutional object, viz.: To drive the Chinese from the state, by preventing them from laboring for their livelihood? I apprehend that, to these questions, but one candid answer can be given.

I am therefore of opinion that, irrespective of the rights secured to the Chinese by the treaty, the law is void, as not being a "reasonable," *bona fide*, or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed class had been Irish, Germans, or Americans; that the corporations have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living, and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms as may be agreed upon, subject only to such police laws as the state may enact with respect to them, in common with private individuals.

In the foregoing observations I have treated the question discussed as if the reservation had been found in a special charter, by which the corporation was created, and its franchises conferred.

I have endeavored to show that such a reservation cannot be construed to authorize the legislature to impair the obligation of any contract lawfully made by a corporation, or to deprive the corporation of any vested property or rights of property lawfully acquired. But in this state the constitution forbids the legislature to create private corporations by special act. They may be "formed" (*i. e.*, by private persons,) "*under general laws.*" All persons who choose to avail themselves of the provisions of these laws may acquire the franchises which they offer. These *general laws* may be repealed or altered. What would be the effect upon the existence or rights of corporations already formed, of the repeal or alteration of these laws, it is not necessary here to inquire.

It is sufficient to say that the legislative power cannot be greater under such a provision than under a reservation of a power to amend or repeal contained in a charter, by which a corporation is created and its franchises conferred.

2. But, even if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty.

"In every such case" (where the federal government has acted) "the act of congress or the treaty is supreme, and the law of the state, *though enacted in the exercise of powers not controverted*, must yield to it." Per Mr. C. J. Marshall, in *Gibbons v. Odgen*, 9 Wheat. 211.

The principle thus enunciated by the great chief justice has never since been disputed. *Henderson v. Mayor of New York*, 92 U. S. 272; *R. Co. v. Husen*, 95 U. S. 465-472.

The article of the constitution of this state, under which the law under consideration was enacted, is as follows:

#### "ARTICLE XIX.

##### "CHINESE.

"Section 1. The legislature shall prescribe all necessary regulations for the protection of the state, and the counties, cities and towns thereof from the burdens and evils arising from the presence of aliens who are or *may become* vagrants, paupers, mendicants, criminals, or invalids, afflicted with contagious or infectious diseases, and from aliens otherwise dangerous or detrimental to the *well-being or peace* of the state, and to *impose conditions upon which such persons may reside in the state, and to provide the means and mode of their removal from the state* upon failure or refusal to comply with such conditions; *provided*, that nothing contained in this section shall be construed to impair or limit the power of the legislature to pass such police laws or other regulations as it may deem necessary.

"Sec. 2. No corporation now existing, or hereafter formed under the laws of this state, shall, after the adoption of this constitution, employ, *directly or indirectly*, in any capacity, any Chinese or Mongolians. The legislature shall pass such laws as may be necessary to enforce this provision.

"Sec. 3. No Chinese shall be employed on any state,

county, municipal, or other public work, except in punishment for crime.

"Sec. 4. The presence of foreigners ineligible to become citizens is declared to be dangerous to the well-being of this state, and the legislature shall discourage their immigration by all the means within its power \* \* \* \*."

The end proposed to be attained by this extraordinary article is clearly and even ostentatiously avowed. Its title proclaims that it is directed against the Chinese. It forbids their employment by any but private individuals, and when through the operation of the laws they shall have become, or be liable to become, vagrants, paupers, mendicants, or criminals, the legislature is directed to provide for their removal from the state if they fail to comply with such conditions as it may prescribe for their continued residence.

The framers of the article do not seem to have relied upon the efficacy of the provisions imposing such extensive restrictions upon the rights of the proscribed race to labor for their living, to reduce them to the condition of vagrants, paupers, mendicants, or criminals, or persons who "may become" such. The legislature is directed to impose conditions of residence, and provide for the removal of "*aliens otherwise dangerous or detrimental to the well-being or peace of the State,*" and lest any doubt or hesitation should be felt as to the propriety of including wealthy and respectable Chinese in this class, the fourth section declares "the presence of foreigners ineligible to become citizens of the United States" (*i. e.*, the Chinese) to be "dangerous to the well-being of the state." And the legislature is directed to "discourage their immigration by all the means within its power."

Would it be believed possible, if the fact did not so sternly confront us, that such legislation as this could be directed against a race whose right freely to emigrate to this country, and reside here with all "the privileges, immunities, and exemptions of the most favored nation," has been recognized and guaranteed by a solemn treaty of the United States, which not only engages the honor of the national govern-

ment, but is by the very terms of the constitution the supreme law of the land?

The legislature has not yet attempted to carry into effect the mandate of the first section by imposing conditions upon which aliens who are or may become vagrants, paupers, mendicants, or criminals, may reside in the state, or by providing for their removal. Its action thus far has been limited to forbidding the employment of Chinese, directly or indirectly, by any corporation formed under the laws of this state. The validity of this law is the only question presented for determination in the present case. In considering this question we are at liberty to look not merely to the language of the law, but to its effect and purpose.

"In whatever language a statute may be framed, its purpose may be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the passenger cases." *Henderson v. The Mayor, etc.*, 92 U. S. 268.

"If, as we have endeavored to show, in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further." *Chy Lung v. Freeman* 92 U. S. 279.

If the effect and purpose of the law be to accomplish an unconstitutional object, the fact that it is passed in the pretended exercise of the police power, or a power to regulate corporations, will not save it. If a law of the state forbidding the Chinese to labor for a living, or requiring them to obtain a license for doing so, would have been plainly in violation of the constitution and treaty, the state cannot attain the same end by addressing its prohibition to corporations.

In *Cummings v. The State of Missouri*, Mr. Justice Field, speaking for the court, observes: "Now, as the state, had she

attempted the course supposed, would have failed, it must follow that any other mode of producing the same result must equally fail. The provisions of the federal constitution intended to secure the liberty of the citizen cannot be evaded by the form in which the power of the state is exerted. If this were not so—if that which cannot be accomplished by means looking directly to the end can be accomplished by indirect means—the inhibition may be evaded at pleasure. No kind of oppression can be named, against which the framers of the constitution intended to guard, which may not be effected.” 4 Wall. 320.

The application of these pregnant words to the case at bar is obvious. Few will have the hardihood to deny the purpose and effect of the article of the constitution which has been cited. It is in open and seemingly contemptuous violation of the provisions of the treaty which give to the Chinese the right to reside here with all the privileges, immunities and exemptions of the most favored nation. It is in fact but one, and the latest, of a series of enactments designed to accomplish the same end. The attempt to impose a special license tax upon Chinese for the privilege of mining, the attempt to subject them to peculiar and exceptional punishments commonly known as the Queue Ordinance, have been frustrated by the judgments of this court. The attempt to extort a bond from ship-owners, as a condition of being permitted to land those whom a commissioner of immigration might choose to consider as coming within certain enumerated classes, has received the emphatic and indignant condemnation of the supreme court. *Chy Lung v. Freeman*, 93 U. S. 275. But the question which now concerns us is: Does the law under consideration impair or destroy the treaty rights of Chinese residents? For it may be a part of a system obviously designed to effect that purpose, and yet not of itself be productive of that result. Its practical operation and effect must, therefore, be adverted to.

The advantages of combining capital, and restricting individual liability, by the formation of corporations, have, from



the organization of this state, been recognized by its laws. That method, now universal throughout the civilized world in the prosecution of great enterprises, has in this state received an unprecedented development. Its laws permit the formation of corporations for any purpose for which individuals may lawfully associate, and the corporations already formed cover almost every field of human activity. The number of certificates on file in the clerk's office of this county alone was stated at the hearing to be 8,397. The number in the entire state is of course far greater. They represent a very large proportion of the capital and industry of the state. The employment of Chinese, directly or indirectly, in any capacity by any of these corporations is prohibited by the law. No enumeration would, I think, be attempted of the privileges, immunities, and exemptions of the most favored nation, or even of man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor. It is as sacred as the right to life, for life is taken if the means whereby we live be taken. Had the labor of the Irish or Germans been similarly proscribed, the legislation would have encountered a storm of just indignation. The right of persons of those or other nationalities to support themselves by their labor stands on no other or higher ground than that of the Chinese. The latter have even the additional advantage afforded by the express and solemn pledge of the nation.

That the unrestricted immigration of the Chinese to this country is a great and growing evil, that it presses with much severity on the laboring classes, and that, if allowed to continue in numbers bearing any considerable proportion to that of the teeming population of the Chinese Empire, it will be a menace to our peace and even to our civilization, is an opinion entertained by most thoughtful persons. The demand, therefore, that the treaty shall be rescinded or modified is reasonable and legitimate. But while that treaty exists the Chinese have the same rights of immigration and residence as are possessed by any other foreigners. Those rights it is

the duty of the courts to maintain, and of the government to enforce.

The declaration that "the Chinese must go, peaceably or forcibly," is an insolent contempt of national obligations and an audacious defiance of national authority. Before it can be carried into effect by force the authority of the United States must first be not only defied, but resisted and overcome. The attempt to effect this object by violence will be crushed by the power of the government. The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the state; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance.

I have considered this case at much greater length than the difficulty of the questions involved required. But I have thought that their great importance, and the temper of the public with regard to them, demanded that no pains should be spared to demonstrate the utter invalidity of this law.

SAWYER, J. The constitution of California, adopted in 1879, provides that "no corporation now existing, or hereafter formed, under the laws of this state, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The legislature shall pass such laws as may be necessary to enforce this provision." Article 19, § 2.

In obedience to this mandate of the constitution the legislature, on February 13, 1880, passed an act entitled "An act to amend the penal code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations," the first section of which statute reads as follows:

"Section 1. A new section is hereby added to the penal code, to be numbered section 178:

"Sec. 178. Any officer, director, manager, member, stock-

holder, clerk, agent, servant, attorney, employe, assignee, or contractor of any corporation now existing, or hereafter formed, under the laws of this state, who shall employ, in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is guilty of a misdemeanor, and is punishable by a fine of not less than \$100 nor more than \$1,000, or by imprisonment in the county jail of not less than 50 nor more than 500 days, or by both such fine and imprisonment; *provided*, that no director of a corporation shall be deemed guilty, under this section, who refuses to assent to such employment, and has such dissent recorded in the minutes of the board of directors.

"1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows:

"2. For each subsequent conviction, such person shall be fined not less than \$500 nor more than \$5,000, or by imprisonment not less than 250 days nor more than two years, or by both such fine and imprisonment."

The petitioner is president and director of the Sulphur Bank Quicksilver Mining Company, a corporation organized under the laws of California before the adoption of the present constitution, but still doing business within the state. Having been arrested and held to answer before the proper state court, upon a complaint duly made, setting out in due form the offence of employing in the business of said corporation certain Chinese citizens of the Mongolian race, created by said act, he sued out a writ of *habeas corpus*, which, having been returned, he asks to be discharged, on the ground that said provisions of the constitution, and act passed in pursuance thereof, are void, as being adopted and passed in violation of the provisions of the treaty of the United States with the Chinese Empire, commonly called the "Burlingame Treaty," and of the fourteenth amendment to the constitution of the United States, and of the acts of congress passed to give effect to said amendment. The question in this case, therefore, is as to the validity of said constitutional provision and said act. Article 1, § 10, of the constitution of the

United States, provides that "no state shall enter into any treaty, alliance, or confederation." Article 2, § 2, that the president "shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present shall concur;" and article 6, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and *all treaties* made, or which shall be made, under the authority of the United States, shall be the *supreme* law of the land, and the judges in *every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.*"

There can be no mistaking the significance or effect of these plain, concise, emphatic provisions. The states have surrendered the treaty-making power to the general government, and vested it in the president and senate; and, when duly exercised by the president and senate, the treaty resulting is the *supreme law* of the land, to which not only state laws but *state constitutions* are in express terms subordinated. Soon after the adoption of this constitution the supreme court of the United States had occasion to consider this provision, making treaties the supreme law of the land, in *Ware v. Hy-ton*, and Mr. Justice Chase, speaking of its effect, said: "A treaty cannot be the supreme law of the land—that is, of all the United States—if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by repeal, or nullification by a state legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole." 3 Dall. 236. Again: "It is the declared duty of the *state judges* to determine any constitution or laws of any state contrary

to that treaty, or *any other* made under the authority of the United States, null and void. *National or federal judges are bound by duty and oath to the same conduct.*" Id. 237. And again: "It is asked, did the fourth article intend to annul a law of the state, and destroy rights under it? I answer, that the fourth article did intend to destroy all lawful impediments, past and future; and that the law of Virginia, and the payment under it, is a lawful impediment, and would bar a recovery if not destroyed by this article of the treaty. \* \*

\* I have already proved that a treaty can totally annihilate any part of the constitution of any of the individual states that is contrary to a treaty." Id. 242-3.

The case of *Hauenstein v. Lynham*, being an action by citizens and residents of Switzerland, heirs of an alien who died in Virginia, leaving property which had been adjudged to have escheated to the state, to recover the proceeds of said property, was decided at the present term of the United States supreme court on writ of error to the court of appeals of the state of Virginia. The courts of Virginia had held that, under the laws of Virginia, the proceeds of the property sought to be recovered belonged to the state; but the judgment was reversed by the supreme court of the United States, on the ground that the laws of Virginia were in conflict with a treaty of the United States with the Swiss Confederation. After construing the treaty, the court says: "It remains to consider the effect of the treaty thus construed upon the rights of the parties. That the laws of the state, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs in error. The efficacy of the treaty is declared and guaranteed by the constitution of the United States."

The court cites and comments upon *Ware v. Hylton*, *supra*, and then proceeds: "In *Chirac v. Chirac*, 2 Wheat. 259, it was held by this court that a treaty with France gave to the citizens of that country the right to purchase and hold land in the United States, and that it removed the incapacity of alienage, and placed the parties in precisely the same situation as if they had been citizens of this country. The state

law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal v. Banks*, 10 Wheat. 189, and with respect to the British treaty of 1794 in *Hughes v. Edwards*, 9 Wheat. 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by *escheat* under the laws of a state. *Orr v. Hodgson*, 4 Wheat. 453. Mr. Calhoun, after laying down certain exceptions and qualifications, which do not affect this class of cases, says: 'Within these limits, all questions which may arise between us and other powers, be the subject-matter what it may, fall within the treaty-making power, and may be adjusted by it.' *Treat. on the Constitution and Government of the United State*, 204. If the national government has not the power to do what is done by such treaties, it cannot be done at all, for the states are expressly forbidden to enter into any treaty, alliance or confederation. Const. art. 1, section 10. It must always be borne in mind that the constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. See, also, *Shanks v. Dupont*, 3 Pet. 242; *Foster v. Neilson*, 2 Id. 314; *The Cherokee Tobacco*, 11 Wall. 616; Mr. Pinkney's Speech, 3 El. of the U. S. 281; *People v. Gerke*, 5 Cal. 381. We have no doubt that this treaty is within the treaty-making power conferred by the constitution. And it is our duty to give it full effect." The Reporter; vol. 9, p. 268.

If, therefore, the constitutional provision, and the statute in question made in pursuance of its mandate, are in conflict with a valid treaty with China, they are void. The treaty between the United States and China, of July 28, 1868, contains the following provisions:

"Article 5. The United States and the emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the

other for purposes of curiosity, of trade, or as *permanent residents*."

"Article 6. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions, in respect to *travel or residence*, as may there be enjoyed by the citizens or subjects of the most favored nation. And, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to *travel or residence*, as may there be enjoyed by the citizens or subjects of the most favored nation." 16 St. 740.

Thus the right of the Chinese to change their homes, and to freely emigrate to the United States for the purpose of *permanent residence*, is, in express terms, recognized; and the next article in express terms stipulates that Chinese residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to residence, as may there be enjoyed by the citizens and subjects of the most favored nation. The words "privileges and immunities," as used in the constitution in relation to rights of citizens of the different states, have been fully considered by the supreme court of the United States, and generally defined, and there can be no doubt that the definitions given are equally applicable to the same words as used in the treaty with China. In the *Slaughter-house cases*, the supreme court approvingly cites and re-affirms from the opinion of Mr. Justice Washington, in *Corfield v. Coryell*, the following passage: "The inquiry is, what are the privileges and immunities of citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental*; which belong to the rights of citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the government, with the right to acquire and

possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

The court then adds: "The description, when taken to include others not named, but which are of the same general character, *embraces nearly every civil right for the establishment and protection of which organized government is established.*" 16 Wall. 76. And in *Ward v. Maryland*, the same court observes: "Beyond doubt these words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate," etc. 12 Wall. 430. So, in the *Slaughter-house cases*, Mr. Justice Field remarks upon these terms: "The privileges and immunities designated are those which of right belong to citizens of all free governments. Clearly among these must be placed *the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.*" 16 Wall. 97.

Mr. Justice Bradley, in discussing the question as to what is embraced in the "privileges and immunities" secured to the citizens, among other equally pointed and emphatic declarations, says: "In my judgment, the right of any citizen to follow whatever *lawful employment he chooses to adopt* (submitting himself to all lawful regulations) is one of *his most valuable rights, and one which the legislature of a state cannot invade, whether restrained by its own constitution or not.*" *Id.* 113, 114. He also enumerates, as among the fundamental rights embraced in the privileges and immunities of a citizen, all the absolute rights of individuals classed by Blackstone under the three heads, "The right of personal security; the right of personal liberty; and the right of private property;" (*Id.* 115;) and in relation to these rights says: "In my view, a law which prohibits a large class of citizens



from adopting a lawful employment, or from following a lawful employment previously adopted, *does deprive them of liberty, as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.*" Id. 122.

And Mr. Justice Swayne supports this view in the following eloquent and emphatic language: "Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. *Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property.*" Id. 127.

Some of these extracts are from the dissenting opinions, but not upon points where there is any disagreement. There is no difference of opinion as to the significance of the terms "privileges and immunities." Indeed, it seems quite impossible that any definition of these terms could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence. As to by far the greater portion of the Chinese, as well as other foreigners who land upon our shores, their labor is the only exchangeable commodity they possess. To deprive them of the right to labor is to consign them to starvation. The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man, wherever he may be permitted to be, of which he cannot be deprived, either under the guise of law or otherwise, except by usurpation and force. Man ate and died. When God drove him "forth from the Garden of Eden to till the ground, from whence he was taken," and said to him, "in the sweat of thy face shalt thou eat bread, till thou return unto the ground," He invested him with an inalienable right to labor

in order that he might again eat and live. And this absolute, fundamental and natural right was guaranteed by the national government to all Chinese who were permitted to come into the United States, under the treaty with their government, "for the purposes of curiosity, of trade, or as permanent residents," to the same extent as it is enjoyed by citizens of the most favored nation. It is one of the "privileges and immunities" which it was stipulated that they should enjoy in that clause of the treaty which says: "Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation." And any legislation or constitutional provision of the state of California which limits or restricts that right to labor to any extent, or in any manner, not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty; and such are the express provisions of the constitution and statute in question.

The same view of the effect of the treaty was taken in *Baker v. Portland*, by Judge Deady, of the district of Oregon, and concurred in by Mr. Justice Field on application for rehearing. 5 Saw. 566, 572; 3 Pacific Coast Law Journal, 469. I should not have deemed it necessary to cite so fully the opinions of others on a proposition so plain to my mind, but for the gravity of the question, and the fact that the people of California and their representatives in the legislature have incorporated in the constitution of the state, and in legislation had in pursuance of the constitutional mandate, after full discussion, provisions utterly at variance with the views expressed. Under such circumstances I feel called upon to largely cite the thoroughly considered and authoritative views of those distinguished jurists upon whom will devolve the duty of ultimately determining the points in controversy.

As to the point whether the provision in question is within the treaty-making power, I have as little doubt as upon the point already discussed. Among all civilized nations, in

modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the constitution in unlimited terms. Besides, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions such as are admitted shall be permitted to remain. If it has authority to stipulate that aliens residing in a state may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the state, against the provisions of the laws of the state, otherwise valid—and so the authorities already cited hold—then it certainly must be competent for the treaty-making power to stipulate that aliens residing in a state in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. The former must include the latter—the principal, the incidental power. See also *Holden v. Joy*, 17 Wall. 242-3; *U. S. v. Whisky*, 3 Otto, 196-8.

But the provisions in question are also in conflict with the fourteenth amendment of the national constitution, and with the statute passed to give effect to its provisions. The fourteenth amendment, among other things, provides that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1977 of the Revised Statutes, passed to give effect to this amendment, provides that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property

as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

It will be seen that in the latter clause the words are "any person," and not "any citizen," and prevents any state from depriving "any person" of life, liberty or property without due process of law, or from denying to "any person within its jurisdiction the equal protection of the law." In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the constitution; and, in consonance with these provisions, the statute enacts that "all persons within the jurisdiction of the United States shall have the same right in every state and territory *to make and enforce contracts, \* \* \* and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.*" Chinese residing in California, in pursuance of the treaty stipulations, are "persons within the jurisdiction of the state," and "of the United States," and therefore within the protection of these provisions. *And contracts to labor, such as all others make, are contracts which they have a "right to make and enforce," and the laws under which others' rights are protected are the laws to which they are entitled to the "equal benefit," "as is enjoyed by white citizens."*

It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or "the equal protection of the laws," where the laws forbid their laboring, or making and enforcing contracts to labor, in a very large field of labor which is open, without limit, let or hindrance, to all citizens, and all other foreigners, without regard to nation, race, or color. Yet, in the face of these plain provisions of the national constitution and statutes, we find, both in the constitution and laws of a great state and member of this Union, just such prohibitory provisions and enactments discriminating against

the Chinese. Argument and authority, therefore, seem still to be necessary, and fortunately we are not without either. From the citations already made, and from many more that might be made from Justices Field, Bradley, Swayne, and other judges, it appears that to deprive a man of the right to select and follow any lawful occupation—that is, to labor, or contract to labor, if he so desires and can find employment—is to deprive him of both liberty and property, within the meaning of the fourteenth amendment and the act of congress.

Says Mr. Justice Bradley: "For the preservation, exercise, and enjoyment of these rights, the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade, as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, *when chosen, is a man's property and right. Liberty and property are not protected where those rights are arbitrarily assailed.*" 16 Wall. 116. Whatever may be said as to this clause of the amendment, there can be no doubt as to the effect of the act. With respect to the last clause, Mr. Justice Bradley says, of a law which interferes with a man's right to choose and follow an occupation: "*Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.*" Id. 122. And Mr. Justice Swayne: "*The equal protection of the laws places all upon an equal footing of legal equality, and gives the same protection to all for the preservation of life, liberty and property, and the pursuit of happiness.*" Id. 127.

In *Ah Kow v. Nunan*, 5 Saw. 562; 3 Pacific Coast Law Journal, 413, Mr. Justice Field observes: "But in our country, hostile and *discriminating legislation by a state* against persons of any class, sect, creed, or nation, in whatever form it may be expressed, *is forbidden by the fourteenth amendment of the constitution.* That amendment, in its first section, declares who are citizens of the United States, and then enacts that no state shall make or enforce any law which shall abridge

their privileges and immunities. It further declares that no state shall deprive *any person* (dropping the distinctive term citizen) of life, liberty, or property, without due process of law, nor deny to *any person* the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one while within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offences no greater or different punishment." And the same views are expressed with equal emphasis in *In re Ah Fong*, 3 Saw. 157. Discriminating state legislation has often been held void by the supreme court, as being in violation of other provisions of the national constitution, no more specific than the fourteenth amendment. *Welton v. Missouri*, 1 Otto, 277, 282; *Cook v. Pennsylvania*, 7 Otto, 572-3, and numerous cases cited.

Since the foregoing was written I have received the opinion of the supreme court of the United States in *Strauder v. The State of West Virginia*, recently decided, which appears to me to authoritatively dispose of the point now under consideration. The case was an indictment of a colored man for murder, and the statute of West Virginia limited the qualified jurors to white citizens. The statute stating the qualifications of jurors was in the following words: "All white male persons, who are 21 years of age, and who are citizens of this state, shall be liable to serve as jurors, except as herein provided"—the exceptions being state officials. This was claimed to be a violation of the fourteenth amendment, as excluding colored citizens otherwise qualified from jury service: and the

supreme court so held. The court, in deciding the case, says the fourteenth amendment "ordains that no state shall deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory; but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively, as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of the enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race. *That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination, ought not to be doubted, nor would it be if the persons excluded by it were white men.*" 10 Alb. Law Jour. 227.

In speaking of the act to enforce this amendment, the court further says: Sections 1977 and 1978 of the Revised Statutes, before cited, "partially enumerate the rights and immunities intended to be guaranteed by the constitution;" and that "this act puts in the form of a statute what had been substantially ordained by the constitutional amendment." Id. 228. If this exclusion of colored men from sitting upon a jury by *implication* is a violation of the constitution, as denying the equal protection of the laws to colored persons, *a fortiori* must the express positive provisions of the constitution and act of the legislature of the state of California be in conflict with that instrument, as denying the equal protection of the laws to the Chinese residents of the state. Upon reason and these authorities, then, it seems impossible to

doubt that the provisions in question are both, in letter and spirit, in conflict with the constitution and laws of the United States, as well as with the stipulations of the treaty with China. And this constitutional right is wholly independent of any treaty stipulations, and would exist without any treaty whatever, so long as Chinese are permitted to come into and reside within the jurisdiction of the United States. The protection is given by the constitution itself, and the laws passed to give it effect, irrespective of treaty stipulations.

But it is urged on behalf of the respondent that, under the provisions of article 12 of the state constitution, providing that "all laws \* \* concerning corporations \* \* \* may be altered, from time to time, or repealed," the power of the legislature over corporations is absolutely unlimited; that it may, by legislation under this reserved power, impose any restrictions or limitations upon the acts and operations of corporations, however unreasonable, stringent or injurious to their interests; and, as a penalty for violating such restrictions, destroy them, and criminally punish their officers, agents, servants, employes, assignees, or contractors; that, as a condition of continued existence, they may be prohibited from employing Chinese, and the prohibition enforced against the corporation, and the persons named, by means of the penalties indicated; and thus, by means of the state's control over the corporation created by its authority, it can indirectly accomplish the purpose of excluding the Chinese from, perhaps, their largest and most important field of labor—a purpose *which could not be accomplished by direct means*. This position the attorney general and the other counsel for the respondent most earnestly press, and upon it they most confidently rely.

I do not assent to any such unlimited power over corporations. There must be—there is—a limit somewhere. That there is such a limit is recognized and expressly asserted in numerous cases by the supreme court of the United States, and by the highest courts of many of the states; and I know



of none to the contrary. But precisely where the line is to be drawn, I confess, in the present state of the authoritative adjudications, I am unable to say. I am inclined to the opinion, however, that it would exclude legislation of the character in question, even if it concerned the state and the corporations alone, and did not conflict with other rights protected by treaties with foreign nations, or by the constitution of the United States—the supreme law of the land. But assume it to be otherwise. When the state legislation affecting its corporations comes in conflict with the stipulations of valid treaties, and with the national constitution, and laws made in pursuance thereof, it must yield to their superior authority. And such, in my judgment, are the provisions in question. The policy of the constitutional provision and statute in question does not have in view the relations of the corporation to the state, as the object to be effected or accomplished; but it seeks to reach the Chinese, and exclude them from a wide range of labor and employment, the ultimate end to be accomplished being to drive those already here from the state, and prevent others from coming hither—the *discriminating legislation being only the means by which the end is to be attained—the ultimate purpose to be accomplished. The end sought to be attained is unlawful.* It is in direct violation of our treaty stipulations and the constitution of the United States. The end being unlawful and repugnant to the supreme law of the land, it is equally unlawful, and equally in violation of the constitution and treaty stipulations, to use any means, however proper, or within the power of the state for lawful purposes, for the attainment of that unlawful end, or accomplishment of that unlawful purpose. It cannot be otherwise than unlawful to use any means whatever to accomplish an unlawful purpose. This proposition would seem to be too plain to require argument or authority. Yet there is an abundance of authority on the point, although perhaps not stated in this particular form. *Brown v. Maryland*, 12 Wheat. 419; *Ward v. Maryland*, 12 Wall. 431; *Woodruff v. Parham*, 8 Wall. 130, 140; *Hinson v. Lott*, Id. 152; *Welton v. Missouri*, 1 Otto. 279, 282; *Cook v. Pennsylvania*, 7

Otto. 573. These cases hold that the power of taxation, and power to require licenses, are legitimate powers, to be exercised without discrimination; but they are unlawful and unconstitutional when used to discriminate against foreign goods or manufacturers of other states. That is to say, they are constitutional and lawful when used for a constitutional and lawful purpose, but unlawful, and in violation of the constitution, when used to attain an unlawful or unconstitutional end. And whatever form the law may take on, or in whatever language be couched, the court will strip off its disguise, and judge of the purpose from the manifest intent as indicated by the effect.

In *Cummings v. Missouri*, Mr. Justice Field, in speaking for the court, says: "The difference between the last case supposed and the case as actually presented is one of form only, and not substance. \* \* \* The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker, in the case supposed, would be openly avowed; in the case existing, it is only disguised. The legal result must be the same; for what cannot be done directly cannot be done indirectly. The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." 4 Wall. 325. See, also, *Henderson v. Mayor of New York*, 2 Otto, 268; *Chy Lung v. Freeman*, Id. 279; *R. Co. v. Husen*, 5 Otto, 472.

In *Doyle v. Continental Insurance Co.* 4 Otto, 535, most confidently relied on by the respondent, the end to be accomplished—the exclusion of a foreign corporation from doing business in the state except upon conditions prescribed by the state—was lawful, and the means adopted lawful. There were no rights secured by treaty or the national constitution violated. The state and the foreign corporation were the

only parties, and their rights the only rights affected. Had the legislature, instead of prohibiting the corporation from doing business in the state, as a penalty for violation of the conditions prescribed, attempted to enforce compliance by *criminally punishing the agent* who transferred the action brought against the corporation from the state to the national court, the question would certainly have been different, and the statute making the transfer a misdemeanor would have been void; for, under the constitution of the United States, the foreign corporation had a right to transfer the case, of which the state could not by law, nor the corporation by stipulation, deprive it, as was held in *Insurance Company v. Morse*, 20 Wall. 445. It being lawful to transfer, and the right to transfer being secured by the national constitution, it was incompetent for the legislature to make the transfer an offence, and punish it as such, in violation of the supreme law of the land. The act could not at the same time be both lawful and criminal. And this is the plain distinction between the case relied on and the one now under consideration.

The object, and the only object, to be accomplished by the state constitutional and statutory provisions in question is manifestly to restrict the right of the Chinese residents to labor, and thereby deprive them of the means of living, in order to drive those now here from the state, and prevent others from coming hither; and this abridges their privileges and immunities, and deprives them of the equal protection of the laws, in direct violation of the treaty and constitution—the supreme law of the land. To perceive that the means employed are admirably adapted to the end proposed, it is only necessary to consider for a moment some of the leading provisions of article 19 of the state constitution. Section 1 provides that “the legislature shall prescribe all necessary regulations for the protection of the state \* \* \* from the burdens and evils arising from the presence of aliens who are or *may become* vagrants, paupers, mendicants, criminals, etc., \* \* \* and to impose conditions upon which such persons may reside in the state, and to provide the means and

mode of their removal from the state upon failure or refusal to comply with such conditions."

Section 2 is the one which prohibits any corporation from employing, directly or indirectly, in any capacity, any Chinese or Mongolians; and section 3 provides that "no Chinese shall be employed on any state, municipal, or other work, except in punishment for crime." After providing for the removal from the state of all who "*may become* vagrants, paupers," etc., it is difficult to conceive of any more effectual means, so far as they go, to reduce the Chinese to "vagrants, paupers, mendicants, and criminals," in order that they may be removed, than to forbid their employment, "directly or indirectly, in any capacity"—that is to say, to exclude them from engaging in useful labor. If it is competent for the state to enforce these provisions, it may also prohibit corporations from dealing with them in any capacity whatever—from purchasing from or selling to them any of the necessities of life, or any article of trade and commerce.

In view of the vast extent of the field of labor and business now engrossed by corporations, to exclude the Chinese from all dealings with corporations is to reduce their means of avoiding vagrancy, pauperism, and mendicancy to very narrow limits; and from the present temper of our people, and the number of bills now pending before the legislature tending to that end, there can be no doubt that if the legislation now in question can be sustained, the means of avoiding the condition of pauperism denounced in the state constitution and laws would soon be reduced to the *minimum*.

In the language of *Deady*, J., in *Baker v. Portland*, "admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and overriding the treaty-making power altogether." 5 Saw. 750; 3 Pacific Coast Law Journal, 469.

Vagrancy and pauperism, one would suppose, ought to be discouraged rather than induced by solemn constitutional mandates requiring legislation necessarily leading to such vices. Common experience, I think, would lead to the conclusion that the Chinese within the state, with equal oppor-

tunities, are as little likely to fall into vagrancy, pauperism, and mendicity, and thereby become a public charge, as any other class, native or foreign born. Industry and economy, by which the Chinese are able to labor cheaply and still accumulate large amounts of money to send out of the country—the objection perhaps most frequently and strenuously urged against their presence—are not the legitimate parents of “vagrancy, pauperism, mendicity, and crime.” There are other objections to an unlimited immigration of that people, founded on distinctions of race and differences in the character of their civilization, religion, and other habits, to my mind of a far more weighty character. But these, unfortunately for those seeking to evade treaty stipulations and constitutional guarantees, can by no plausible misnomer be ranged under the police powers of the state.

Holding, as we do, that the constitutional and statutory provisions in question are void, for reasons already stated, we deem it proper again to call public attention to the fact, however unpleasant it may be to the very great majority of the citizens of California, that however undesirable, or even ultimately dangerous to our civilization, an unlimited immigration of Chinese may be, the remedy is not with the state, but with the general government. The Chinese have a perfect right, under the stipulations of the treaty, to reside in the state, and enjoy all privileges, immunities, and exemptions that may there be enjoyed by the citizens and subjects of any other nation; and, under the fourteenth amendment to the national constitution, the right to enjoy “life, liberty, and property,” and “the equal protection of the laws,” in the same degree and to the same extent as these rights are enjoyed by our own citizens; and in the language of Mr. Justice Bradley, in the *Slaughter-house Cases*, “*the whole power of the nation is pledged to sustain those rights.*” To persist, on the part of the state, in legislation in direct violation of these treaty stipulations, and of the constitution of the United States, and in endeavoring to enforce such void legislation, is to waste efforts in a barren field, which, if expended in the proper

direction, might produce valuable fruit; and, besides, it is little short of incipient rebellion.

In 1870 the Chinese at Tien-tsin, actuated by similar unfriendly feelings and repugnance towards foreigners of the Caucasian race, made a riotous attack upon the missionaries stationed at that place, killed some French and Russian citizens, and destroyed the buildings and property of French, Russian and American residents. These powers promptly and energetically demanded satisfaction from the Chinese Empire under their various treaties. The result was that 15 Chinese were convicted and executed, and twenty others banished. The two magistrates having jurisdiction as heads of the city government were also banished, for not taking effectual means to suppress the riot and protect the foreigners. The buildings of the American citizens were re-erected, and the property destroyed paid for, to the satisfaction of the parties suffering, and at the expense of the city. Papers on Foreign Relations for 1871. Thus, under the same treaty which guarantees the rights of Chinese subjects to reside and pursue all lawful occupations in California, the United States were prompt to demand satisfaction for injuries resulting to our citizens from infractions of the treaty by citizens of China. And the Chinese government promptly punished the guilty parties, and made ample satisfaction for the pecuniary losses sustained. It ought to be understood by the people of California, if it is not now, that the same measure of justice and satisfaction which our government demands and receives from the Chinese emperor for injuries to our citizens, resulting from infractions of the treaty, must be meted out to the Chinese residents of California who sustain injuries resulting from infractions of the same treaty by our own citizens, or by other foreign subjects residing within our jurisdiction, and enjoying the protection of similar treaties and of our laws. And it should not be forgotten that in case of destruction of, or damage to, Chinese property by riotous or other unlawful proceedings, the city of San Francisco, like the more populous city of Tien-tsin, may be called upon to make good the loss.

In view of recent events transpiring in the city of San Francisco, in anticipation of the passage of the statute now in question, which have become a part of the public history of the times, I deem it not inappropriate in this connection to call attention to the fact, of which many are probably unaware, that the statutes of the United States are not without provisions, both of a civil and criminal nature, framed and designed expressly to give effect to, and enforce that provision of, the fourteenth amendment to the national constitution, which guarantees to every "person"—which term, as we have seen, includes Chinese—"within the jurisdiction" of California "the equal protection of the laws." Section 1979 of the Revised Statutes provides a civil remedy for infractions of this amendment. It is as follows: "Every person who, under the color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities, secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Thus a remedy by action is given to any "person," against any other person who deprives him of "any right, privilege, or immunity," secured to him by the constitution, even if it is done "under color of any statute, ordinance, regulation, custom or usage of the state." Possibly the prisoner might have been liable had he, in pursuance of the mandate of the statute in question, *and on that ground*, discharged the Chinamen for whose employment he is now under arrest. But it is unnecessary to so determine now. At all events, he stood between two statutes, and he was bound to yield obedience to that which is superior.

Section 5510 makes a similar deprivation of rights under color of any statute, etc., a criminal offence, punishable by fine and imprisonment. And section 5519 provides that "if two or more persons in any state \* \* \* conspire \* \* \* for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal pro-

tection of the laws, or of equal privileges and immunities under the law, \* \* \* each of such persons shall be punished by a fine of not less than \$500 nor more than \$5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment." These provisions of the United States statutes—the supreme law of the land—are commended to the consideration of all persons who are disposed to go from place to place, and, by means of threats and intimidation, endeavor to compel employers to discharge peaceable and industrious Chinamen engaged in their service. There are other provisions, both civil and criminal, of a similar character, having the same end in view.

Only a few days since the supreme court of the United States sustained an indictment in *In re Coles* and *The Commonwealth of Virginia*, petitioners, on *habeas corpus*, against a county judge of Virginia, found under section 4 of the civil rights act of 1875, (18 Stat. 336,) for failing to summon colored citizens as jurors, "on account of race and color." The court held this act to be constitutional and valid under the fourteenth amendment, *and that it deprived colored citizens of the equal protection of the laws*. Thus it appears that congress, by the most stringent statutory provisions, has provided for the protection of all citizens and persons within the jurisdiction of the United States, in the full and complete enjoyment of the "equal protection of the laws," and of all "privileges and immunities guaranteed" by the fourteenth amendment, in all their phases; and that the highest judicial tribunal of the nation has deemed it its duty to give such statutory provisions the fullest and most complete effect.

The result is that the prisoner is in custody in violation both of the constitution and laws of the United States, and of the treaty between the United States and the Empire of China, and is entitled to be discharged; and it is so ordered.



## THE NORTH NOONDAY MINING CO. v. THE ORIENT MINING CO.

(Circuit Court, D. California. March 4, 1880.)

**ONLY CITIZENS CAN LOCATE MINING CLAIMS.**—Under the act of congress of May 10, 1872, relating to the public mineral lands, none but citizens of the United States, and those who have declared their intention to become such, can acquire any right to such lands by location.

**HOW NATURALIZED, AND MODE OF PROOF.**—A foreign born son of an alien may become a citizen by being naturalized, or by the naturalization of his father, during his minority; but whether he or his father was so naturalized or not, is a question of fact for the jury; and, as tending to prove that fact, the affidavit of the party himself is competent evidence for all purposes of said act of May 10, 1872.

**POWER OF MINERS TO LIMIT WIDTH OF LODE CLAIMS.**—By implication, the act of May 10, 1872, confers upon the miners the right to limit the width of a lode claim to 25 feet on each side of the middle of the vein.

**MINERS' RULES MUST BE IN FORCE.**—But, to be of any validity, a rule or custom of miners must not only be established or enacted, but must be *in force* at the time and place of the location. It does not, like a statute, acquire validity by the mere enactment, but from customary obedience and acquiescence of the miners. It is void whenever it falls into disuse, or is generally disregarded.

**QUESTION OF FACT.**—It is a question of fact for the jury whether or not a mining law or custom is in force; but, when shown to have been in force, the presumption is that it continues in force until the contrary is proved; and parol evidence is admissible to show whether the rule or custom is in force or not.

**DEFINITION OF VEIN OR LODE.**—A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin or many feet thick, or irregular in thickness; and it may be rich or poor, provided it contains a trace of any of the metals named in the statute.

**DISCOVERY OF A VEIN.**—No rights can be acquired, under the statute, by location, before the discovery of a vein or lode within the limits of the claim located.

**DISCOVERY OF VEIN AFTER LOCATION.**—But a location is made valid by the discovery of a vein or lode at any time after the location, provided that such discovery is made before any valid location of the same claim by other persons.

**OTHER VEINS THAN THOSE DISCOVERED.**—Where a valid location is made upon a vein or lode discovered, the locator is not only entitled to the vein discovered, but to every other vein and lode throughout its entire depth, the top or apex of which lies within the surface lines of the claim ex-

tended vertically downwards, to which no right had attached in favor of other parties at the time the location became valid, although such veins or lodes may so far depart from a perpendicular as to extend outside of the vertical side lines.

**HOW LOCATION TO BE MARKED.**—A location of a mining claim must be distinctly marked on the ground, so that its *boundaries* can be readily traced, but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground or claim they shall be placed. Any marking on the ground claimed, by stakes, mounds and written notices, whereby the *boundaries* can be readily traced, is sufficient. If the center line of a location of a lode claim, lengthwise, be marked by a prominent stake or monument at each end thereof, upon one of which is placed a written notice showing that the locator claims the length of said line upon the lode, from stake to stake, and a specified number of feet in width on each side of said line, such location is so marked that the boundaries may be readily traced; and, so far as the marking of the location is concerned, is a sufficient compliance with the law.

**RIGHT OF SUBSEQUENT LOCATOR TO OBJECT.**—A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location, or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim.

**AS TO RECORD OF A MINING CLAIM.**—Where a rule or custom of miners, in force, requires a location to be recorded, such recording is necessary; otherwise, not. To make a valid record it must contain the names of the locators, the date of the location, and such a description of the claim, by reference to some natural or permanent monument, as will identify the claim; but such natural objects or permanent monuments are not required to be on the ground located, although they may be, and the natural object may consist of any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. If, by reference to any such natural object or permanent monument, the claim recorded can be identified with reasonable certainty, the record will be sufficient in this particular; otherwise, not.

**WORK NECESSARY TO HOLD A CLAIM.**—The statute requires \$100 worth of work on each claim located after May 10, 1872, in each year, and in default thereof authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, and before any relocation is made, he thereby preserves his right to the claim; and no other person has any right to relocate it after such resumption of work, in good faith, by the first locator, even though the latter had failed to perform any work for the period of one year or more immediately before he resumed work.

**AS TO LOCATION AND SALE BY AN ALIEN.**—If, in the attempt by an alien to locate a claim, he performs all the acts necessary to a valid location by a citizen, and then conveys such claim to a citizen, who takes possession and continues to perform all the conditions required by law to hold such claim, such citizen thereby acquires and holds a valid title to the claim so located by the alien, as against all persons having acquired no right therein before such conveyance by the alien.

**JOINT LOCATION BY CITIZEN AND ALIEN.**—If a citizen and an alien jointly locate a claim, not exceeding the amount of ground allowed by law to one locator, such location is valid as to the citizen, and a conveyance from both of such locators to a citizen gives a valid title.

**CORPORATION WHEN DEEMED A CITIZEN.**—A corporation organized and existing under the laws of California, is to be deemed a citizen in the sense of the act of congress of May 10, 1872.

**WHAT IS ACTUAL POSSESSION.**—A person who has purchased a mining claim which had been properly located and marked out on the ground, and who is, personally or by agents, upon the claim, working and developing it, and keeping up the boundary stakes and marks thereof, is not merely in the constructive possession of such claim, by virtue of mining laws, but is in the actual possession of the whole claim. Such possession is a *possessio pedis*, extending to the boundary lines of the claim.

This was an action in the nature of an action of trespass upon a lode mining claim, in the Bodie mining district, California, in which the defendant pleaded title to the *locus in quo*.

The case was removed from the state court to the circuit court of the United States, where it was tried by a jury.

*Stewart, Vanclief & Herrin*, for plaintiff.

*R. M. Clark and George B. Merrill*, for defendant.

SAWYER, J., (*in charging jury*.) Gentlemen of the jury, I congratulate you that we are approaching the conclusion of this trial. It has run through many days, but has not been without interest.

The questions that have been presented are many, and some of them difficult; but the case has been thoroughly prepared. It has been zealously, exhaustively, and ably tried and argued on both sides. Whatever great ability, great zeal, thorough preparation, and a thorough knowledge of the subject is able to contribute, has been contributed to explain and illustrate this case. Science has also been called into exercise. You have had a glass model here, which shows you the internal condition of these mines. You have had another

model which exhibits to your view the shafts, drifts, cross-cuts, veins and their connections, in their proper location, and illustrates to you all the workings of the mines. You have had diagrams, also, exhibiting the same workings in that form, and everything, indeed, which could be desired to throw light on the subject, has been prepared and arranged and presented for your consideration and the consideration of the court.

Counsel having ably discharged their duty, it now devolves on the court to state to you the law governing this case; and then it will be your duty, gentlemen, and your province, to determine the facts. The questions of fact are for you to determine; the weight to be given to the evidence, the credibility to be given to the witnesses; and everything relating to a disputed question of fact is for your sole consideration and determination.

If I state the testimony, I shall only do it for the purpose of calling your attention to it and stating its tendency; but I shall not go over it fully. If I intimate an opinion on a question of fact, you are not to be governed by it, unless it corresponds with your own ideas as to what the facts are. If I make a mistake in stating the testimony, or alluding to a fact, you will correct it by your own recollection and judgment. I do not intend to express an opinion on the questions of fact, where the testimony is in conflict. I shall state to you the law which governs this case, and it is your duty to take the law from the court.

There are questions here that are new and have never been determined before, so far as I am aware. Some of them, as stated before, are difficult; some I may not be entirely clear about; but I have reached certain conclusions on the questions of law that have been so ably argued, and those I shall state to you so far as I deem them applicable to the case, and you will take them from the court and be governed accordingly. Whether right or wrong, it is your duty to act on them as given by the court. If the court makes a mistake, or an error of law, it is known where that error lies. It can be re-examined by the court on a motion for a new

trial; or it can be taken to a higher tribunal, where the error will be corrected. But if you disregard the law as given to you by the court, and commit an error, it cannot be known on what error you acted. Therefore, there is no means of correcting your errors of law; but errors of fact may, perhaps, be corrected. You will, therefore, regard strictly the law as given you by the court, but you yourselves will determine the facts of the case.

Counsel on one side have presented a large number of instructions, and on the other side a less number. I have forty odd pages of instructions asked by one side. I shall not attempt to read these instructions. They are generally disconnected, and, even if correct, would serve rather to confuse than to illustrate. All, however, could not be given. I will state to counsel here that I shall only give such of their instructions as are covered by the general charge, and in my own language, as it will be delivered to the jury. In other respects, except as given in my own language, their instructions will be refused.

By an act of congress which took effect May 10, 1872, all valuable mineral deposits in lands belonging to the United States were declared to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as applicable and not inconsistent with the laws of the United States.

In order to acquire any right of location and purchase under this act, a party seeking to acquire such right must either be a citizen of the United States, or must have declared his intention to become such. If, therefore, Smith, or any other locator under whom plaintiff claims, was not a citizen, or had not declared his intention to become such at the time of making his location, he acquired no right, under the act, by virtue of such location. And whether Smith, or any other of such locators, was, at the time of his location, a citizen, or had declared his intention to become such, is a

question of fact for you to determine from the evidence. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, and none others, are citizens of the United States. A person born in a foreign country, out of the jurisdiction of the United States, whose father is not a citizen of the United States, can only become a citizen by naturalization. The foreign born son becomes a citizen by being himself naturalized, or by the naturalization of his father during the minority of the son. If, therefore, Smith was alien born, it was necessary that he should be naturalized, or that his father should be naturalized, during his minority, in order to make him a citizen. The statute, for the purpose of acquiring a mining location, makes the affidavit of the party himself competent evidence of his naturalization. It is for you to determine the sufficiency of the evidence to establish the fact.

All the locations under which plaintiff claims were made since May 10, 1872; and, at the time they were respectively made, the statute authorized a claim to be 1,500 feet in length along the vein or lode, and it was provided that "no claim shall extend more than 300 feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface."

In the absence, then, of any mining rule or custom *in force* at the time of the location, at the place where it is made, the location may extend to the distance of 300 feet on each side of the middle of the vein at the surface; that is to say, the claim may be 1,500 feet in length along the vein, by 600 feet wide, including 300 feet on each side of the middle of the vein.

As I construe the statute, however, and so instruct you, by implication, the miners, by a rule, regulation, or custom established and *in force* at the time and place of the location, may limit the width of the claim to 25 feet on each side of the middle of the vein at the surface. But such limitation to 25 feet on each side, to be valid, must be by virtue of a rule, regulation, or custom which has not only been estab-

lished, but which is actually *in force* at the time of the location. The regulation must be in accordance, and not in conflict with, the laws of the United States and of the state of California; and the laws of California provide that, "in actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and *in force* at the bar or diggings embracing such claim; and such customs, usages, or regulations when not in conflict with the laws of this state, must govern the decision of the action." This provision is still in force, except so far as its operation is limited by the act of congress.

One of the locations under which plaintiff claims was made November 10, 1875, and the claim was relocated December 15, 1876, each time 300 feet wide on each side of the lode; the notice in terms purporting to locate it under the act of congress allowing such location.

It is claimed by the defendant that there was, at the time of the location and relocation, a regulation in force in that district limiting the claim to 50 feet on each side of the vein, and that the location of 300 feet is therefore void. Now, whether there was or not such a regulation or custom *in force* at the time is a question of fact to be found by the jury from all of the evidence in the case on that point.

The defendant, to show a regulation limiting the location to 50 feet on each side, introduced the minutes of proceeding of a miners' meeting in the district, held July 10, 1860, in which there is a rule making such limitation, and minutes of meetings held at various times subsequently, amending the rules, but continuing this rule in force down to and including November 13, 1867, at which time the last action in respect to modifying the rules and regulations was had till December 30, 1876, which is after said location and relocation, and nine years after any meeting amending said rules. At said meeting of December 30, 1876, the miners declined to adopt the "United States mining laws;" and no action upon the subject of rules is shown to have been since had by any miners' meeting.

The plaintiff, to meet this testimony, introduced the min-

ing records of the district, from which it appears that from and including the year 1872, when the act of congress referred to took effect, and thenceforth down to the year 1875, only one quartz location was made in the district, there being none in 1872, one in 1873, in which no width was specified, and none in the year 1874; that during the year 1875 eleven quartz locations were made, of which nine were made 300 feet wide on each side of the lode, and purported to have been made in pursuance of said act of congress, and two only of 50 feet wide on each side, one of which two was marked on the record as abandoned; and during the year 1876 twenty-five locations appear to have been made, of which five were 300 feet wide on each side of the vein, one an extension of a 600 feet claim having no width mentioned, and the others 50 feet wide on each side, four of which being after the relocation by Lockberg. From this it is argued by plaintiff that quartz mining in the district was practically abandoned for several years, and no laws on the subject were practically in force; that on the return of the miners, and the revival of mining in 1875, the act of congress had been passed, and the miners regarded that act as superseding the old laws on this point, and as authorizing the location of quartz claims 300 feet wide on each side, and in practice adopted and generally acquiesced in that rule—the rule limiting the claims to 50 feet, by common consent, falling into disuse and ceasing to be in force. As held by the supreme court of California, in commenting upon the provision of the state statute cited, “no distinction is made by the state statute between a ‘custom’ or ‘usage,’ the proof of which must rest in parol, and a ‘regulation’ which may be adopted by a miners’ meeting and embodied in a written local law. This law does not, like a statute, acquire validity by the mere enactment, but from the customary obedience and acquiescence of the miners following its enactment. It is void whenever it falls into disuse, or is generally disregarded. It must not only be *established*, but in *force*.”

“A custom reasonable in itself and generally observed will  
v1, no. 8—34



prevail as against a written mining law which has fallen into disuse. It is a question of fact for the jury whether the mining law is in force at any given time." It is for you, then, gentlemen of the jury, to determine whether this limitation to 50 feet was actually *in force* at the time the two locations 300 feet wide on each side were made. The fact that the rule in question was adopted and kept on foot in the laws for a considerable period of time would be *prima facie* evidence, nothing to the contrary appearing, that it was in force at one time, and, being once in force, a presumption would arise that it continued in force till something appears tending to show that it had been repealed, or had fallen into disuse and another practice been generally adopted and acquiesced in. The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused. Now, gentlemen, whether, in view of there being few locations in this district during several years, and none in some, and of the passage of the act of congress referred to, and the location, at first, after the revival of the mining interest in 1875, of most all claims, in pursuance of the provisions of the act, 300 feet wide on each side, if such be the fact, and in view of all the circumstances appearing in the evidence, it is for you to determine whether the 50 feet limitation had fallen into disuse, or was really *in force* at the date of the two locations in question. If it was *not* in force, then, in that particular, if otherwise valid, the location was good and valid to the full extent of 300 feet on each side of the vein. If the limitation was in force, then it was void as to the excess over 50 feet on each side of the vein, but valid to the extent of 50 feet, and no more.

The statute also provides, gentlemen of the jury, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." So that no rights can be acquired under the statute by a location made before the discovery of a vein or lode within the limits of the claim located. A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or

with some other kind of rock, in place, carrying gold, silver, or other valuable mineral deposits named in the statute. It may be very thin, and it may be many feet thick, or thin in places—almost or quite pinched out, in miners' phrase—and in other places widening out into extensive bodies of ore. So, also, in places, it may be quite or nearly barren, and, at other places, immensely rich. It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the claim located, to entitle the miner to make a valid location including the vein or lode. It may, and often does, require much time and labor and great expense to develop a vein or lode after discovery and location sufficiently to determine whether there is a really valuable mine or not, and a location would be necessary before incurring such expense in developing the vein to secure to the miner the fruits of his labor and expense in case a rich mine should be developed. If, then, the locators of the East Noonday North, for example, discovered such a mineral vein or lode as I have described, however small, before the location of that claim, the location of the claim embracing within its lines the vein or lode so discovered was, in this particular, valid, otherwise not. The same observation would be true as to each of the other claims held by plaintiff.

I instruct you further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations and customs in force at the place at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery his claim would be good to the limits of his claim, and the location valid. So, also, gentlemen of the jury, where a party has made a location of a mining claim upon a mineral vein or lode discovered by him, in all respects valid, he is entitled to "have the exclusive right of possession and enjoyment of all the surface included within the lines of

his location, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downwards vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of such surface location." That is to say, if the plaintiffs or their grantors discovered a mineral vein or lode in the North Noonday claim, and made and have now in all respects a valid location of that claim, then they are not only entitled to the particular vein or lode so discovered and located in said claim, but to all other minerals, veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of their surface lines extended vertically downwards, to which no right had attached in favor of other parties at the time their location became valid, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downwards as to extend outside the vertical side lines of the surface location. If the plaintiff has a valid claim to 600 feet wide, then its right extends to all such veins or lodes, under the conditions stated, so within the surface lines bounding the 600 feet drawn vertically downwards; and, if the vein in question is one of the veins having its top or apex within such surface lines drawn vertically downwards, its right extends to and includes that vein. If it has a valid claim to 100 feet wide, and only so much, then to such veins or lodes within the 100 feet lines.

The same principle and instruction applies to the Keystone and East Noonday North claims. If the plaintiff has a valid location to those claims, or either of them, then it is entitled to all the veins or lodes under similar circumstances, the apices or tops of which lie within the surface lines of such valid location, or locations, extended vertically downwards.

The next point to which I shall call your attention, gentlemen of the jury, is the location. To make a valid location, under the statute, it is required that "the location must be distinctly marked on the ground, so that *its boundaries can be readily traced*;" but the law does not define or prescribe what kind of marks shall be made, or upon what part of the ground

or claim they shall be placed. Any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located *can be readily traced*, is sufficient.

If the center line of a location of a lode-claim lengthwise along the lode be marked by a prominent stake or monument at each end thereof, upon one or both of which is placed a written notice showing that the locator claims the length of said line upon the lode from stake to stake, and a certain specified number of feet in width on each side of said line, such location of the claim is so marked that the boundaries may be readily traced; and, so far as the marking of the location is concerned, is a sufficient compliance with the law.

If, therefore, as the testimony tends to show, the locator of the North Noonday mining claim planted a prominent stake at a shaft sunk in the earth on a vein, lode or ledge, upon the northern side of which was placed a notice, stating that he claimed 1,500 feet on "this the Noonday Quartz Lode," including all the dips, spurs, angles and feeders, together with 300 feet on each side; that said claim begins at a point in the center of a small shaft about one-fourth of a mile northerly from Queen Bee Hill, and extends thence in a northerly direction 1,500 feet to a post and mound upon which is inscribed "Noonday Quartz Lode, Charles Smith's Northern Boundary," and erects such mound and stake at said northern boundary, and marks said inscription thereon, the location is distinctly marked on the ground, so that its boundaries can be readily traced within the meaning of the act, and is a compliance with the law in that particular. The same principle is equally applicable to the Keystone location, and to that of the East Noonday North.

There is testimony tending to show that the rule and custom of miners in Bodie district, at the time the several locations under which plaintiff claims were made, required mining claims to be recorded. If you find such to have been the rule or custom in force at the time, then a record was necessary, otherwise not.

In order to make a valid record, it was necessary for it to

contain the name, or names, of the locator or locators; the date of the location, and such a description of the claim, or claims, located, by reference to some natural or permanent monument, as would identify the claim.

The natural objects or permanent monuments here referred to are not required to be on the ground located, although they may be; and the natural object may consist of any fixed natural object; and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. The record of each location of the North Noonday, Keystone, and East Noonday North, introduced by plaintiff in evidence, contained the names of the locators, the date of their location, and a description of the claim located, by reference both to a *shaft* and to stakes planted in the ground having notices of the location thereon.

If you are satisfied, from the evidence, that these records were in fact made, (and there is no evidence to the contrary,) and that the descriptions of the several claims located therein contained, by reference to the natural and permanent monuments mentioned, were such as would identify the claims with reasonable certainty, then you will find the records sufficient and valid in this particular, otherwise insufficient.

As there has been much comment upon the record of the East Noonday North location, I think it proper to call your attention more particularly to it.

The record appears to be a copy of the notice placed on the claim, and would, doubtless, so be understood by a miner reading it for information. A person reading the record would be informed by it that the owners of the Noonday claim were the claimants, and that the claim was named the East Noonday North, probably, with reference to the Noonday claim; that it was located on Silver Hill, a natural, well-known object; that the claim commenced at a stake with a notice on it, of which the record is a copy, placed east of the Noonday shaft, which is a permanent object, having, as the testimony tends to show, already existed eight or ten years,

and extended in a northerly direction from the stake 1,500 feet by 50 feet on each side.

There was, then, in the record, a description of the location with reference to Silver Hill, a natural object, and the Noonday shaft, a permanent object, and it is for the jury to determine whether a miner, seeking information from this record, could go to the permanent object, the Noonday shaft on Silver Hill, and thence east, and find the stake and notice pointing out the location on the ground with reasonable certainty. If so, the jury will be justified in finding that there is such a description of the claim in the record, with reference to some natural or permanent object, as to identify it, and that the location is valid in this particular. It was not necessary for the claimants to finally mark the location on the ground till after the record was made, and the testimony tends to show that the location was not fully completed till the next day after the record was made, when the locators planted this stake with the notice on the south line of the claim, and of the North Noonday claim 100 feet east of the Noonday shaft, with another at the northerly end, and that this became the final location on the ground, and which, the testimony tends to show, was ever after claimed, and subsequently surveyed, and stakes placed at the corners.

If the jury find that the location was at that time actually marked upon the ground by stakes and notices, so that its boundaries could be readily traced in the manner I before instructed you, was sufficient with reference to the North Noonday claim, then the location was sufficient in this particular also.

The testimony also tends to show that, prior to any rights being acquired by the defendant, plaintiff's grantors, in addition to the lode line stakes set up at the location of their several claims, planted other stakes and monuments at the various corners of their claims, thus forming a parallelogram 1,500 feet long by 300 feet wide, including the Keystone, East Noonday North, and a portion of the original North Noonday claims, with a line of five stakes on each end of the parallelogram; and that they and the plaintiff renewed these

stakes from time to time, as they were removed, until the work was commenced at the combination shaft, which has ever since been continuous to the present time; and it is claimed that if there was at the time of the location any defect in the marking on the ground, this additional marking, before any rights were acquired by the defendant, was clearly sufficient to validate these claims. In regard to this point, I instruct you, gentlemen, that a subsequent locator cannot object that a prior location of a mining claim was not sufficiently marked on the ground at the time of its location, provided such prior location was sufficiently marked on the ground before such subsequent locator made any location or acquired any rights in such claim.

The testimony tends to show, and there is none to the contrary, that Smith did no work on the North Noonday within the year after he located it, in 1875, and supposing he had forfeited his claim he procured Lockberg to relocate it for him, and convey it, on December 16, 1876; that Lockberg did so relocate it on that day and immediately conveyed it to Smith, who then, either alone, or in connection with others interested with him, entered upon the claim and did sufficient work during the year to hold it for that year; and that Smith paid the recording fees, \$15.

If these be the facts, and no other rights had in the meantime attached—and there is no evidence that any had attached—then, if the location made by Lockberg was otherwise sufficient and legal, and Lockberg and Smith were American citizens, Smith, by the several proceedings, had acquired a valid right to the claim.

The statute requires \$100 in value of work to be done on each claim located after May 10, 1872, in each year, in order to hold it; and, in default of such work being done, authorizes the claim to be relocated by other parties, provided the first locator has not resumed work upon it. But if the first locator resumes work at any time after the expiration of the year, before other rights attach in favor of relocators, he preserves his claim.

The statute nowhere authorizes a person to trespass upon

or to relocate a claim, before properly located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim.

It is urged by defendant that Smith was not a citizen, and, therefore, that he could acquire no right by location. In view of this claim, and in case you find from the evidence this to be the fact, I give you this further instruction:

The testimony shows that Smith, at various times, before defendant acquired any interest, conveyed portions of whatever right he had to other parties next hereinafter named, and finally, on September 28, 1878, conveyed all his remaining interest in all of the claims, by specific description, to said parties, Irwin, John and James Welch and Patrick Clancy, in whom, whatever interest had before been acquired by virtue of said several locations, at this time had become vested.

If Smith, even though not a citizen, performed all the acts necessary to make a valid location, and did the work necessary to keep his claim good, had he been a citizen, until he conveyed to Irwin and others, and if Irwin and his co-grantees were citizens, and after the conveyance to them took possession and control, and kept up the monuments and markings, and performed the necessary conditions to keep the claims good, then they acquired a good and valid right to the claim, as against defendant, from the date of the conveyance to them, provided that no other rights had attached in defendant's favor prior to such conveyance to them, and such subsequent performance of said required conditions by them.

The East Noonday North claim was located by Welch, Smith and Irwin November 27, 1877, before any rights had been acquired by the Orient Company, defendant. The claim contains no more than one man was authorized to locate. So that, if one or more of the locators were citizens, in that particular the location of the claim was good as to such citizen or citizens, even though one or more of the others were aliens and not entitled to locate. If, therefore, one or more of these loca-



tors were citizens, and the claim was in other particulars well located, and the proper conditions performed to hold the claim till the subsequent conveyance to plaintiff, November 20, 1878, a good title thereto, as against defendant, passed to the North Noonday Company, plaintiff, by that conveyance.

The North Noonday Mining Company, plaintiff, is a corporation, created and existing under the laws of California, and is, therefore, to be deemed a citizen within the meaning of the statute, and as such is competent to purchase and hold a mining claim. Irwin, the Welches, and Clancy, as locators of the East Noonday North and grantees of Smith of the other claims and of his interest in the East Noonday North, held all the interest in all said claims acquired by the various proceedings in question, and so holding such interest on November 20, 1878, conveyed all their interest in all said claims to the North Noonday Mining Company, plaintiff, which thereby became vested with all the interest that could be acquired by virtue of said transactions. If, therefore, the grantors of plaintiff had performed all the acts necessary for a citizen to perform in order to locate and hold said several claims down to the date of said conveyance, and the said plaintiff took possession and control of said several claims upon receiving said conveyance, and thereafter kept the said claims properly marked on the ground and performed all the conditions necessary to maintain their said claims, then said plaintiff acquired a good title to such of said claims as were so properly in form located and kept up as against said Orient Mining Company, defendant, provided said defendant acquired no rights in said claims, or any of them, prior to the acquisition of said interest by said plaintiff through said conveyance, and such subsequent acts of said plaintiff to preserve their rights to said claims, even though one or more of said original locators should be found not to have been citizens, and, on that ground, incompetent to acquire any title under said act of congress.

The testimony tends to show various work done on the several claims by the claimants Welch, Smith and others, during 1877 and 1878, claimed by plaintiff to be sufficient to hold

the claims; that Welch, in August, 1878, placed a line of mounds and stakes on each end of the several claims 50 feet apart, for a distance of some 300 feet, by way of indicating the corners and end lines; that Anderson, on October 19, 1878, measured off the claims and again set stakes according to the proper measurements; that these stakes being four inches square, three and one-half feet high, painted white, and marked so as to indicate the corners and lode line of the said claims, were found there by Scowden when he finally surveyed the claims in the following spring and located the shaft.

The testimony further tends to show, and, as to this part of the testimony, I believe there is none to the contrary—if there is any you will remember it—that the interest in all the three claims having been concentrated in the plaintiff, the North Noonday Mining Company, in the preceding November, the plaintiff, in March, 1879, before any other parties had entered upon these claims, or made any claim thereto, located and made arrangements to sink a three-compartment shaft, known as the combination shaft, for the benefit and to be used for the development of all the claims, and also the Noonday claim to the south; that machinery and supplies were at once collected and brought upon the ground for the purpose of sinking said shaft, and developing and jointly working all said claims; that from that time on the plaintiff, by its agents and servants, was actually on the ground erecting machinery and buildings, exercising acts of ownership and dominion over the claims, claiming title to the whole; that the plaintiff commenced sinking the combination shaft on or about April 5, 1879, and from that time to the present has been, by its agents and servants, actually on the ground, constantly and vigorously prosecuting the work of developing and working the mines claimed by them, and constantly exercising dominion over them; that by June 1st buildings and machinery had been erected and brought upon the ground and supplies collected to the amount of more than \$30,000.

If you find these to be the facts, gentlemen of the jury, then there was not at this time merely a constructive possession of these mining claims by virtue of the mining laws alone,

but an actual occupation and possession, a *possessio pedis*, a physical presence of the plaintiff by its officers, agents and servants, actually controlling and dominating the claims as early, at least, as the month of March or April, and the domination and possession extended to the bounds of the claims as described in the conveyance to plaintiff, under which it claimed title, and as indicated by the stakes planted by Anderson and found by Scowden to mark the location, and the notices stating the extent of the claims—the claims lying, the testimony tends to show, in one body, and conveyed by one deed to the same party, and being developed by the same means as a part of one general system. If, therefore, you find from the evidence that the plaintiff acquired and maintained a valid location to all or any of these claims in question by the means in these instructions before indicated, and performed the acts of possession just supposed, before any right had accrued to the defendant, then, as to such claim or claims, the plaintiff had, as against the defendant, both a good title and rightful possession at the time the trespasses are alleged to have been committed, and when it is conceded that the defendant actually entered and committed the acts complained of, and you will find for the plaintiff on those points.

If you find title and rightful possession in the plaintiff, as just indicated, as to all or any of said mining claims, you will then inquire whether the vein or lode in question which the defendant cut in the head of the winze at the end of its cross-cut, called by defendant Orient Lode No. 3, is one of the veins or lodes discovered in any of the claims, the right, title, and possession to which you find to be in the plaintiff as against defendant; and if you find that is one of such veins or lodes, or if you find that it is not one of those lodes, but that it has its apex or top within the side lines of any such claim, the title and possession to which you so find to be in the plaintiff, drawn vertically downwards, then, in either case, it belongs to the plaintiff, and your verdict will be for the plaintiff. But if you find that said vein or lode so cut by defendant is not one of the veins or lodes discovered within any claim, the title to which you find in the plaintiff,

and that its apex or top is not within the side lines of any such claim of plaintiff drawn vertically downwards, but is a separate, independent vein, every part of which lies to the eastward, or outside of and beyond any claim, the title to which you find to be in plaintiff, and no part of the apex or top of which is within the side lines of such claim drawn vertically downwards, then it does not belong to plaintiff and your verdict will be for defendant.

If you find for the plaintiff, gentlemen, you will then inquire what the damages are. The testimony on the question of damages is that about 55 tons of ore have been taken out, and I think the testimony is that it is about \$25 or \$30 per ton in value. The damages will be the value of the quartz removed; at all events, if you cannot agree on the damages, they are entitled to nominal damages, say one dollar.

If you find for the plaintiff, your verdict will be—

“We, the jury, find for the plaintiff, and assess the damages at so many dollars.”

If, on the other hand, you find for the defendant, your verdict will be—

“We, the jury, find for the defendant.”

The verdict of the jury was for the plaintiff, with one dollar damages.

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### BURKE v. FLOOD and others.

*(Circuit Court, D. California. January 26, 1880.)*

REMOVAL OF CAUSES UNDER ACT OF 1875.—Under the first clause of the second section of the act of 1875, which reads, “In any suit of a civil nature, \* \* \* in which there shall be a controversy between citizens of different states, \* \* \* either party may remove said suit,” etc., it is necessary, to authorize a removal, that all the persons on one side shall be citizens of different states from those on the other side of the controversy. But to determine the right of removal the parties may be transposed and arranged on opposite sides of the controversy according to their real interests, without regard to their formal position on the record as plaintiffs or defendants.

REMOVAL UNDER SECTION 639, REV. ST.--B., a citizen of California, filed his bill in equity as a stockholder therein against the C. V. M. Co., a California corporation, the P. W. L. & F. Co., also a California corporation; F., a citizen of California, and M. & F., citizens of Nevada, all the latter being stockholders and officers, or agents, of both corporations, for an account between said corporations, and between the P. W. L. & F. Co. and F. M. & F., and for a recovery from said defendants by the C. V. M. Co. of a large amount of profits on numerous contracts alleged to have been fraudulently made in pursuance of a conspiracy, through defendants F. M. F. and O'B., acting as officers and agents of both corporations, and which profits came to the possession of F. M. F. and O'B. in dividends from P. W. L. & F. Co., the parties other than the corporations being copartners in business, and their acts complained of being their joint acts for their joint benefit as such copartners. The suit having been removed from a state court to the United States circuit court as to M. & F., citizens of Nevada, under section 639, Rev. St., on motion to remand, *held*, that there could not be a final determination of the whole controversy as to M. & F. without the presence of the P. W. L. & F. Co. and F., and that for this reason the suit was not removable as to M. & F. under the provisions of said section.

SAWYER, J. This cause having been removed from the state court on the petition of all the defendants, under the first clause of section 2 of the act of 1875, and by the defendants, Mackey and Fair, as to them, under the act of 1866, as carried into section 639 of the Revised Statutes, second subdivision, the complainant moved to remand it to the state court on the ground that this court has no jurisdiction, and that the case is not removable under either act. Upon the principle adopted in the *Sewing Machine cases*, (18 Wall. 553,) which arose under the act of 1867, and under the decision of the supreme court, made at the present term, in *Meyer et al. v. The Delaware Railroad Construction Company*, which arose under the first clause of section 2 of the act of 1875, and presented the point, I regard it as settled by that court that to remove a case under the latter provision it is necessary that all of the persons constituting the party on one side of the controversy must be citizens of different states from those on the other side. But for the purpose of removal the parties may be transposed and arranged in their proper positions, with reference to their interest in the controversy, without regard to their formal position as plaintiffs or defendants on the record. This is the rule, as I understand it,

to be laid down in the latter case, upon mature consideration, after a re-argument, in which any attorney feeling an interest in the question, whether of counsel in the case or not, was invited to participate as *amicus curiæ*. In this court this will be regarded by me as the settled construction of the section until otherwise ruled by the supreme court. In this case, even after transposing the Consolidated Virginia Mining Company, defendant, to the side of the complainant, Burke, we have still two citizens of California on one side of the controversy, and two citizens of the same state, California, and two citizens of Nevada on the other. The persons composing the party on one side of the controversy, therefore, not being all citizens of different states from the party on the other, the case was not removable under the construction established, and it must be remanded.

Was the case properly removed as to defendants Mackey and Fair under the act of 1866, as carried into the Revised Statutes in section 639? The complainant, Burke, a citizen of California, files his bill against the Consolidated Virginia Mining Company and the Pacific Wood, Lumber & Flume Company, both corporations organized under the laws of California, J. C. Flood, a citizen of California, and John W. Mackey and James G. Fair, citizens of Nevada. He alleges in substance, among other things, that he is a stockholder in the Consolidated Virginia Mining Company; that he has made a demand upon that corporation to bring the suit, which it declined to do; whereupon he brings it himself as a stockholder on his own behalf, and on behalf of all other stockholders who choose to come in and share in the expense of this prosecution, making the corporation a defendant. He further alleges that defendants Flood, Mackey and Fair, and W. S. O'Brien, were either directors, or controlled the directors of the defendant, the Consolidated Virginia Mining Company; that they fraudulently conspired together to injure the Consolidated Virginia Mining Company, and to that end organized the corporation defendant, the Pacific Wood, Lumber & Flume Company, of which they were the stockholders and officers, or controlled the officers; that through the de-

defendants Flood, Mackey and Fair, and W. S. O'Brien, since deceased, acting as officers or agents of both corporations, or through officers controlled by them, the Consolidated Virginia Mining Company entered into large contracts with the Pacific Wood, Lumber & Flume Company, whereby the latter agreed to supply and did supply to the former large quantities of wood and lumber at prices, which were in fact paid, larger than the same supplies could have been purchased for from other parties, and that the said Pacific Wood, Lumber & Flume Company thereby received profits on said contracts to the amount of \$4,000,000, in excess of what it should have received, which profits came to the possession of said O'Brien and defendants Flood, Mackey and Fair through said Pacific Wood, Lumber & Flume Company, as the stockholders of said corporation. He also alleges that during the whole period embracing the transactions set out said Flood, O'Brien, Mackey and Fair were partners in business, and that their acts complained of were the joint acts of said partners, and performed for their joint benefit as members of said copartnership. He then asks that said contracts be declared void, and that an account be taken between the said Consolidated Virginia Mining Company on one side, and the said Flood, Mackey and Fair, and the Pacific Wood, Lumber & Flume Company on the other, of the moneys paid by the Consolidated Virginia Mining Company to the Pacific Wood, Lumber & Flume Company, and received by the latter under said contracts, and of the profits resulting therefrom realized by said defendants or either of them, or by said O'Brien, deceased, and that on said accounting the defendants be decreed to repay all said profits, moneys, etc., to the Consolidated Virginia Mining Company.

It will be seen that the remote parties are the complainant, Burke, as a stockholder of the Consolidated Virginia Mining Company; and Flood, Mackey and Fair, as stockholders of the Pacific Wood, Lumber & Flume Company—indeed, of both corporations. That the immediate parties to the contracts sought to be examined and set aside, and an account of whose profits is sought to be taken, are the Consolidated

Virginia Mining Company, and the Pacific Wood, Lumber & Flume Company, and that the moneys sought to be recovered are moneys paid by the first-named corporation to the latter upon the contracts set out, and paid by the latter in dividends to the said defendants Flood, Mackey and Fair, and to said O'Brien. The primary and immediate parties to the transaction alleged are the two corporations. The rights and liabilities of the complainant and the other defendants are secondary and derivative,

The provision of the Revised Statutes under which the removal is had, so far as applicable, is, when a suit is by a citizen of the state wherein it is brought "against a citizen of the same and a citizen of another state, it may be so removed as against said citizen of another state upon the petition of such defendant \* \* \* if, so far as it relates to him, it \* \* \* is a suit in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the case."

Upon the allegations of this bill can there be a final determination of the controversy, so far as concerns Mackey and Fair, without the presence of the Pacific Wood, Lumber & Flume Company, or without the presence of Flood? In my judgment there cannot. I do not see how a final account can be taken between the Consolidated Virginia Mining Company and the Pacific Wood, Lumber & Flume Company as to the profits on the contracts between them set out, and then between the latter corporation as to the amount of said moneys paid by it to Flood, O'Brien, Mackey and Fair, as copartners, without the presence as a party of either said corporation, or said Flood or O'Brien. Certainly none could be taken that would bind said corporation, or Flood, or O'Brien, without their presence, and, therefore, none that could be final as to Mackey and Fair. If one suit can be successfully prosecuted against Mackey and Fair alone, and another against Flood and the Pacific Wood, Lumber & Flume Company alone, then one can be prosecuted against each of said parties alone, and there might be in different



states, and in five different courts, five different suits pending upon these same transactions, and five different accounts taken between the Consolidated Virginia Mining Company and the Pacific Wood, Lumber & Flume Company, and another account between the latter corporation and Flood, O'Brien, Mackey and Fair, in each of the five suits; and the result in no two of the suits in any respect agree. Could they all be final? If not, then no one would be final. It was stated on the argument, and it is a notorious fact, daily reported in the newspapers, that there is in fact now pending in a state court by the same complainant, Burke, against the representatives of O'Brien alone, a proceeding for an account of the same transactions, so that if this suit is also divided there will in fact be pending three out of the five possible suits in which this litigation may be split up, and in three different courts. It is claimed by the complainant that the defendants are *tort-feasors*, and that each defendant is liable individually for all the moneys wrongfully received by the Pacific Wood, Lumber & Flume Company from the other corporation, and paid to the other defendants as dividends; but I do not suppose that he claims that the Consolidated Virginia Mining Company is entitled to recover the whole from each of the five parties involved in the transaction. But in case of a suit against each, he would probably claim that he would be entitled to elect to take the largest sum found due upon the accounting in the several separate suits. Suppose in the five several suits brought, or that this suit is divided as proposed, and in the one against the Pacific Wood, Lumber & Flume Company there should be a decree for complainant, and the accounting showed four millions as claimed in the bill to be the amount of profits to be paid to the Consolidated Virginia Mining Company, but that Mackey and Fair in their half of the suit, or either of them, if sued alone, should succeed in defeating the claim altogether, and procure a decree on the merits in their favor; and, further, that the Pacific Wood, Lumber & Flume Company should pay the claim, would it not be entitled to call upon Mackey and Fair to refund the amount actually wrongfully received

by them in dividends? But the accounting between the Consolidated Virginia Mining Company and the Pacific Wood, Lumber & Flume Company, and between the latter and Mackey and Fair, taken in the suit of *Burke v. The Pacific Wood, Lumber & Flume Company*, would not be conclusive, for the reason that Mackey and Fair were not parties to it, and the whole would have to be gone over again, with perhaps an entirely different result. So, also, suppose Burke should not be able to satisfy his decree against the Pacific Wood, Lumber & Flume Company and Flood, if the latter were a party to it, and should seek to enforce his judgment against Mackey and Fair upon their personal liability as stockholders under the statutes for their share of the decree, then Mackey and Fair would either be concluded by the judgment against the corporation for whose liability they are responsible as stockholders, in a proceeding to which they were not parties, and for a claim which in suits against them individually they had defeated, or else there would have to be another accounting. There would at all events have to be another accounting to ascertain their share of the liability.

Again, it is alleged in the bill that Flood, O'Brien, Mackey and Fair, during all the time mentioned, were partners in business, and that all the transactions complained of as to them were on their joint account as such copartners. If so, all moneys received by them on the transactions as alleged were partnership funds—partnership assets—and must be accounted for as such. Under these allegations they are not merely joint, or joint and several *tort-feasors*. The act is a firm act—an act of a single indivisible commercial entity. The moneys received as dividends from the corporation and which are sought to be recovered were partnership funds. An account which shall be binding on the parties cannot be taken of partnership transactions without the presence of all the partners. Each member is individually liable, it is true; for all the obligations of the firm, but if he is compelled to pay the whole he is entitled to contribution. Whatever the rule as to contribution may be as between mere joint or joint and several *tort-feasors*—and there appears to be some con-

flict of authority as to them (see *Trustees and Tort-Feasors*, 1 Am. Law Rev. N. S. 36)—I take it there can be no doubt that a partner is entitled to contribution from his copartner when he has paid more than his share of the firm liabilities, even though the liabilities grow out of a tortious act of the firm. When money has come into the hands of a partnership on a partnership transaction, however unlawfully or wrongfully acquired as between the members, it is partnership assets, and must be accounted for as such as between themselves. *McBlair v. Gibbes*, 17 How. 337. In this case the supreme court, approvingly quoting from a prior case, says: "Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some act of parliament has been violated? The answer is that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do *as between the parties*. The difference (he observes) between enforcing illegal contracts and asserting title to the money which has arisen from them is distinctly taken in *Tenant v. Elliot* and *Farmer v. Russell*, and recognized by Sir William Grant in *Thompson v. Thompson*."

Also in *Brooks v. Martin*, 2 Wall. 70, 81, it is held that "after a partnership contract, confessedly against public policy, has been carried out, and money contributed by one of the partners had passed into other forms—the *results* of the contemplated operation completed—a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract."

The principle stated in these cases covers this case. Upon the allegations of the bill these contracts set out between the two corporations were fulfilled, the consideration paid over, and the original transactions closed. The profits accrued thereupon, according to the allegations of the bill, came to the firm of Flood, O'Brien, Mackey and Fair, as partners, and, however obtained, they were upon that hypothesis partnership assets, and as between them must be so treated.

Should this suit be divided, then, and one part proceed in one court and another in a different court, or should there be five separate suits, and Mackey and Fair defeat the complainant, yet if the complainant should recover in some of the other suits, and the defendant therein be compelled to pay the decree, Mackey and Fair would be undoubtedly liable to be called upon in another suit to contribute, and the whole litigation would have to be gone over again. It must be born in mind that this is not an action at law against mere *tort-feasors* to recover *damages* for some tortious act, but a suit in equity to have an account of specific moneys paid to a corporation on contracts fully executed, alleged to be illegal, and by it distributed to its stockholders in dividends.

But suppose it turns out that Flood, O'Brien, Mackey, and Fair were not partners; that their acts were not partnership acts, and that the dividends received were not partnership assets, I do not perceive that it would affect the question as to the *finality* of the determination within the meaning of the statute. There is nothing necessarily or essentially fraudulent or morally wrong in the mere fact that Flood, O'Brien, Mackey and Fair owned stock, or even a controlling amount of stock, in, and are officers of, the two corporations; or that, being such stockholders and officers, one corporation through their agency sells wood and lumber to the other. It may well be for the best interest of both corporations to enter into such transactions. The Consolidated Virginia Mining Company is not the only party wanting wood and lumber, and the Pacific Wood, Lumber & Flume Company is a corporation organized and competent to sell wood and lumber to all who desire to purchase. It may have facilities for furnishing these articles of large and general consumption which enables it to sell them at lower prices than they can be obtained for elsewhere. If that be the case, it would be to the advantage and interest of the other corporation to purchase from it, even though its officers and agents are also officers and agents of the other corporation. Should these parties, on the ground of the delicacy of their position, decline to purchase of the Pacific Wood, Lumber & Flume Company on better terms

(if better terms were offered) than could be obtained elsewhere, the complainant in this suit, as a stockholder in the Consolidated Virginia Mining Company, would be very likely to complain. The position of Flood, O'Brien, Mackey and Fair may be delicate, and their acts in it call for rigid scrutiny, but there is nothing necessarily fraudulent or morally wrong in it. These acts of purchase, however, are alleged to be at higher prices than others charged, and in pursuance of a conspiracy to injure the purchaser, and to be in fact fraudulent. It is easy upon information and belief to charge conspiracy and fraud whereby enormous profits accrue to the alleged culpable parties; but it is quite a different matter to establish them by satisfactory proofs. As now presented, no answer even having been filed, the matters rest upon naked allegations upon information and belief. It is impossible to anticipate what may turn out in the proofs. It may possibly turn out in some legal aspect of the case that defendants may be adjudged to account, whether rightfully or not, under circumstances disclosing no actual fraud, and no moral delinquency at all. In such a case a right to contribution would certainly arise in favor of the party who is called upon to pay more than his share, even though there is no partnership between them. At all events, various results may be reached in different suits and different courts, under different views, different management, or different proofs; and under various possible aspects there might well be reasonable ground to claim a right to contribution, and wherein a party might reasonably bring an action to enforce it, though he might fail in the action. In such a case the finality of the determination, as to the party charged in the accounting who pays more than his share, does not depend upon the result of his action to compel a contribution, but upon whether he has reasonable ground in good faith to seek to compel a contribution, even though he may ultimately fail. For the purpose of this motion we cannot look forward and determine absolutely whether a right of contribution will ultimately exist or not. If it can be seen that, under any aspect of the case that may reasonably be presented, there may be reasonable

ground to prosecute an action for contribution, then any determination as to an accounting, in a proceeding where all of the parties interested are not present and bound by the determination, cannot be regarded as a *final* determination as to those parties within the meaning of the statute authorizing the removal of the case.

The fact of a liability to further litigation as between the parties, to ultimately determine their rights as between themselves, upon reasonable ground, is itself sufficient to render the determination not final as to Mackey and Fair, without reference to the ultimate result of such renewed litigation. I think I see a reasonable liability to such further litigation in various possible aspects that may be presented, whether the acts of Flood, O'Brien, Mackey and Fair turn out to be partnership acts, and the moneys received by them from the corporation partnership assets or not. The court is not now called upon to determine the merits of this case, or the ultimate rights of these parties between themselves, but only to ascertain whether a decision of the branch of the suit between complainant and Mackey and Fair, without the presence of the other parties, is likely to be a *final* determination of the *whole* controversy as to them, so that there shall be no further ground to litigate their rights as to these same transactions with the other parties to them. Looking at the case from any point of view, then, it seems clear to me that there cannot be a "final determination of the controversy" as to Mackey and Fair, or either of them, or as to anybody else, without the presence of the Pacific Wood, Lumber & Flume Company, Flood, and the representatives of O'Brien. Indeed, nothing would be *finally* determined as to any of the parties in a suit against a portion of the defendants.

I suppose the right of citizens of California to have their controversies among themselves adjudicated in the state courts is as absolute and indefeasible as that of a citizen of Nevada to have his controversy with a citizen of California adjudicated in the national courts. Indeed, in the state courts the jurisdiction is general and universal, while that of the national courts is limited to the cases expressly provided

for and specially pointed out by the United States constitution and the laws of congress made in pursuance thereof; and the case must be clearly brought within the language of the national constitution and statutes, or the national courts cannot assume jurisdiction. If a citizen of Nevada finds it for his interest to enter into such business relations with citizens of California that his rights cannot be separately determined, he does so at his own option, and while he enjoys the benefits of such relations, he also necessarily accepts the inconveniences incident to the relation; one of which is that when his rights are so intermingled with those of his associates that they cannot be separately finally determined, he may find it impracticable to appeal to the national courts, because he cannot do so without the violation of the rights of other parties to litigate in the state courts equally sacred, and therefore lose the privilege which he otherwise would have to litigate them in the national courts. If this be the result, it is in consequence of his own voluntary action, and he cannot expect congress or the courts to strain their authority in devising ways or pretexts for relieving him from the embarrassments incident to the relations which he himself has voluntarily assumed.

Upon the allegations of the bill, with my views of the case, I should not hesitate to sustain a demurrer to it for want of necessary or indispensable parties, had the defendants Flood and the Pacific Wood, Lumber & Flume Company been omitted, thus presenting the case in the position it would be in after removal to this court, as to them, by Mackey and Fair.

In my judgment, therefore, this is not a case that is authorized to be removed under section 639 of the Revised Statutes, and the removal was improperly made.

Upon the grounds stated, an order was made remanding the case to the state court, but the return of the record having been stayed for a limited time, to enable counsel to determine what course they would pursue, a petition was filed on behalf of Mackey and Fair for rehearing of the motion to remand, as to them, under section 639 of the Revised Stat-

utes, in order to enable counsel to present another point not suggested or argued on the first hearing, and counsel have been heard on this petition.

The point which counsel desire to present is that the facts alleged in the bill do not present any ground for relief, and that upon the face of the bill there must be a final decree for the defendants Mackey and Fair, and this being so, they claim that a final decree should be made on the face of the bill itself, and that such decree would be a final determination of the controversy, as to them, and the case should be retained to be disposed of on that ground.

Whether the bill states a good cause of action has not been argued; a rehearing being asked in order that it may be argued for the purpose of determining the jurisdictional question, and I shall therefore not express any opinion as to its sufficiency. But, assuming for the purposes of the petition for rehearing, that the court would hold, upon argument, the bill to be insufficient, and that there must be a decree for Mackey and Fair on that ground, the objections pointed out in deciding the other points already considered and determined would not be obviated. It would only be a determination of that branch of the particular action. It would not finally determine the rights of Mackey and Fair in the *other branch* of the action still pending against Flood and the Pacific Wood, Lumber & Flume Company. It would not *finally* determine their rights in the *whole* controversy. The effect of a determination of the branch of the case against Mackey and Fair in their favor, upon demurrer to the bill, would be no greater than if determined in their favor after a final hearing on the evidence. Upon a removal, as to Mackey and Fair only, under the act of 1866, the other branch of the same controversy, as against Flood and the Pacific Wood, Lumber & Flume Company, would remain in the state court. Owing to differences of views, differences of proofs, or difference in the course of proceeding, different results may be reached in the different branches of the controversy pending in the state and national courts, and thereby the *whole* controversy, as we have seen, would not be finally determined.



This court might be of opinion that the defendants Mackey and Fair are entitled to a final decree upon the face of the bill, while the state court, having jurisdiction of the other branch of the controversy, might determine that Flood and his co-defendant were not entitled to a decree upon the same bill, and under the same circumstances. Or the position of the courts might be reversed. We cannot assume that the determinations of different courts would necessarily be the same. The very right to transfer at all is based upon the idea that the result in the national court may be different from that in the state court. The same might be true upon a final hearing upon the evidence, but the effect would be the same in either event, whether determined on demurrer or final hearing. If Mackey and Fair should succeed in wholly defeating the complainant in their branch of the case and of the controversy, either on demurrer or a hearing, and the complainant should succeed, as to Flood and his co-defendant, then, under the views I have taken, Mackey and Fair would be immediately liable to be called upon to contribute, either on his personal liability to complainant as a stockholder, or in a suit by the Pacific Wood, Lumber & Flume Company, or at the suit of his copartner or associate Flood, and the whole litigation have to be gone over again. The *whole* controversy would not be *finally* determined. If, on the other hand, Flood and his co-defendant should succeed in their defence, and Mackey and Fair be charged in their branch of the case, then they would be in a position to call upon Flood or the estate of O'Brien to contribute, and the same relitigation would result. The truth is, as I view the case, whatever the ruling upon the case might be, the *whole* of the controversy cannot be *finally* determined without the presence of all the parties to the entire controversy.

As the case appears to me, nothing affecting the question of jurisdiction would result from an argument of the demurrer, however it might be determined, and a rehearing for that purpose would be futile. It is therefore denied. If the views expressed are sound, and they seem clearly so to my mind,

there is but one course for me to pursue, and that is to remand the cases on both petitions to the state court, and it is so ordered.

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STERN v. WISCONSIN CENT. R. Co. and others.

(*United States Circuit Court, E. D. Wisconsin.* January, 1880.)

EQUITY PLEADING AND PRACTICE—RAILROAD MORTGAGE—FORECLOSURE BY BOND HOLDER.—Trustees in a railroad mortgage sued for strict foreclosure and general relief. Afterwards they filed a supplemental bill praying that a plan of re-organization, adopted by a large majority of bond holders, might be decreed, and a certain litigating bond holder restrained from interference. The litigating bond holder filed his independent bill for a foreclosure sale of the property and removal of the trustees. *Held*, that the litigating bond holder could only be heard for his individual rights by coming into the trustees' pending suit, and that his independent suit must be staid.

The opinion in this cause (8 Reporter, 488) was delivered before the defendants had pleaded, and while the case was before the court solely on a master's report, upon exceptions taken by defendants to the bill for scandal and impertinence. No issue had been at that time made on the record which involved the merits; but the court, nevertheless, upon simple inspection of the bill, declared at once that the action could not be maintained; and this intimation, given in advance of issue joined, was supposed by the court to substantially dispose of the case. The plaintiff, however, filed an amended bill, to which the defendant company demurred, and the defendant trustees filed a plea setting up the pendency of their own suit, and denying all the frauds which were alleged in the bill and have been already excepted to as scandalous and impertinent. The answer filed by the trustees in support of this plea denied, under oath and in detail, every fact and circumstance which charged improper action on the part of the present trustees, Stewart and Abbot, or of their predecessor, (the late Chief Justice Bigelow, of Massachusetts,) or of the defendant company. The case then came on to be heard upon the demurrer and plea.

— *Mariner*, for complainant.

*Lynde & Wegg*, for trustees.

DYER, J. This case now comes before the court upon the demurrer of the railroad company, and the plea of the trustees, Stewart and Abbot, to the amended bill. The disposition of the case which, at least for the present, the court feels constrained to make, necessitates a statement of the history of the litigation which has thus far proceeded in this court, touching the subject-matter of this bill; as such litigation has arisen, not only in the present suit, but in the suit previously commenced by the trustees, which is now pending in this court. In view of the fact that this case, when it came up on exceptions to the original bill, was heard by the circuit judge, and, as the parties and their counsel, upon that hearing, received from him an expression of his views, which it was, at the time, supposed would give direction to further proceedings in the cause, I have felt it my duty to consult him with reference to the present *status* of the case, and the disposition which should be made of it in the shape in which it again comes before the court, and I am authorized to say that he entirely concurs in the disposition which it is now proposed to make of the case.

On the thirty-first day of December, 1875, George T. Bigelow and John A. Stewart, mortgagees and trustees in a mortgage made by the Wisconsin Central Railroad Company, on the first day of July, 1871, to secure an issue of bonds, filed their bill in this court against the railroad company and the Phillips & Colby Construction Company, in which was alleged the execution of the bonds and mortgage, the construction of a large portion of the railroad, and the acquisition of the title to 400,000 acres of lands, under a grant made in aid of the construction of the road, and the prayer of which bill was that the trustees might have possession of the road, lands and property described in the mortgage, and that the railroad company might be barred and foreclosed of and from all equity of redemption in and to the mortgaged premises. From other allegations in the bill, it would appear that the suit was instituted as a measure in aid of the completion of the

road, and of the acquisition of the entire land grant, and it did not seek a judicial sale of the mortgaged premises. Nothing further transpired in this suit until September 9, 1878, when, by leave of the court, an amended and supplemental bill was filed, in which, among other things, the death of Bigelow was suggested. This bill recited the substance of the original bill, and alleged that after the filing of the original bill such arrangements had been made between the bond holders and the railroad company that the road had been completed and the balance of the land grant had been earned. This arrangement included the funding of a large amount of coupons, which, for that purpose, were detached from the bonds, and sales of over three millions of additional bonds, and the use of funds thus obtained in the work of construction.

The bill further alleged the surrender of the road to the railroad company by the Philips & Colby Construction Company, which previous to such surrender the construction company had operated, the appointment by Stewart of Edwin H. Abbot as joint trustee in place of Bigelow under the mortgage, and his substitution in place of Bigelow as a co-complainant in the suit, and the prayer of the bill was that complainants might have possession of the railroad, franchises and property covered by the mortgage, and that the railroad company might be barred and foreclosed as prayed in the original bill.

On the thirty-first day of October, 1878, Theodore Stern and William Lawson, owners of bonds secured by the mortgage before spoken of, as such bond holders, filed their independent bill complaining that the trustees under the mortgage had in various ways violated their trust, and asking that the mortgaged property be sold under a decree of foreclosure. The defendants in this bill were, the Wisconsin Central Railroad Company, Charles L. Colby, Gardner Colby, Rowland G. Hazard, Moses Taylor, John A. Stewart, Edwin H. Abbot and H. F. Spencer. The bill set out at considerable length the history of this railroad enterprise; alleged that complainants were not parties to what is known as the fund-

ing scheme, and charged the trustees with various fraudulent acts. Subsequently the complainant Lawson, by his counsel, came into court and asked that the bill be dismissed as to him, and an order of dismissal was accordingly entered, so that thereafter it stood as a bill in behalf of Stern alone.

The case next came to the attention of the court by way of exceptions to the bill, filed by some of the defendants. These exceptions were heard by his honor, the circuit judge, in April, 1879, and he held (*Stern v. Wis. Cent. R. Co. et al.* C. L. N. August 16, 1879, p. 384) that the complainant ought not to proceed with his bill as an independent measure, but that he should come into the suit previously commenced by the trustees, and already pending in this court, and ask to be admitted for the protection of any equities which might exist in his favor; and in his opinion the circuit judge observed that if Stern should come in as a party to the original suit, it might be that he would have the right to ask the court to direct the trustees to amend their bill so that there might be a sale of the property, and that it would then be the duty of the court to consider what his equities might be, and how far those equities had been prejudiced or impaired, if at all, by any wrongful act of the trustees. No order was at the time made upon the specific exceptions which had been filed to the bill.

Subsequently Stern filed an amended bill, and, no appearance being entered thereto by the defendants, an *ex parte* order was entered by complainant, taking the amended bill as confessed. The case then came before the court upon a motion to set aside this order *pro confesso*, and to strike from the files the amended bill, and this motion was granted for the reason that these proceedings had been taken by complainant without notice to defendants, and without leave of court. The court, however, gave to complainant, leave to refile his amended bill, it being understood that it contained none of the supposed objectionable features of the original bill, and that it was filed for the purpose of more clearly presenting complainant's alleged equities, to the end that he might have a review by the supreme court of the question of his

right as a bond holder to maintain an independent bill in his own behalf. At the time leave was thus granted to file this amended bill, a formal order was entered sustaining one or more of the exceptions to the original bill, and overruling the others, the object of this order being to complete the record and make it accord with the views which had been previously expressed by the court.

This amended bill was refiled on the twenty-eighth day of July, 1879. The Farmer's Loan & Trust Company, the Barney & Smith Manufacturing Company, and the Cambria Iron Company were made additional parties to this amended bill, which reiterated the material allegations of the original bill, adding, however, many new allegations, charging more in detail the alleged fraudulent acts of the trustees, and that the suit which the trustees had previously commenced and was then pending in this court was brought by collusion between them and certain of the bond holders, who sought an inequitable advantage over complainant and other bond holders of his class; alleging, also, that bond holders, in whose behalf, as it was charged, said suit was instituted, were originally interested in the Phillips & Colby Construction Company, and that by virtue of such interests and connection with the construction of the road, and by virtue of the alleged funding scheme, and the issuance of additional bonds under the mortgage, they were asserting and seeking an inequitable and fraudulent advantage over bonds of the class represented by Stern; and the prayer of the bill is, not only that the mortgage be foreclosed and the mortgaged property sold, but that the trustees, Stewart and Abbot, be removed; that a receiver may be appointed to take possession of the mortgaged property; that proper accounts may be taken as between the stockholders and the different classes of bond holders, and that the trustees be enjoined from prosecuting the suit in their names then pending, and from further administration of the trusts and execution of the powers specified in the mortgage.

It should have been previously observed, but may be here stated, that on the twenty-fifth day of November, 1878, Stern

and Lawson filed in the trustees' suit a petition embodying in substance, but with some changes, the allegations of the original bill in their independent suit, and praying that the trustees, Stewart and Abbot, might be removed; that petitioners might become complainants in their place in that suit; that Gardner Colby, Rowland G. Hazard, Moses Taylor, H. F. Spencer, and the Farmers' Loan & Trust Company might be made parties defendant in that bill; and that, if the petitioners should not be made complainants in that suit, they might be permitted to appear and plead, answer or demur, and further file a cross-bill, setting up the facts stated in their petition.

After the dismissal of the bill filed by Lawson and Stern, as to Lawson, and on the eighth day of July, 1879, Stern filed a further or new petition in the trustees' suit, setting up facts as a basis for the prayer of the petition, which was that he might be made complainant in the trustees' suit; that the bill in that case might be amended so as to pray a sale; that a decree of foreclosure and sale might be entered therein; that the cause might be referred to a master to state an account, and to make report touching the matters alleged in the petition. On the twenty-fifth day of July, 1879, complainants in the trustees' suit filed a petition for leave to file a second supplemental bill in that case, and such proceedings were then had that an order was entered allowing a second supplemental bill to be filed, and such a bill, to which the railroad company and Stern were made parties defendant, was on July 25, 1879, filed. On the thirtieth of July an order was entered for the service of a subpoena, under this supplemental bill, upon the solicitor of Stern, and such service was on that day made.

This second supplemental bill states to some extent the history of the proceedings up to that time in the trustees' suit, alleges the filing of an independent bill by Stern & Lawson, and the institution by them of actions at law in the state court upon their bonds, with garnishee proceedings to reach moneys which were the earnings of the railroad company. It alleges that, under the circumstances, the trustees, on the fourth day of January, 1879, took formal possession of

the railroad and of the officers' books, papers and records of the company, as trustees under the mortgage, and were then in possession and operating the road. It alleges the proceedings which had taken place in the Stern suit, and sets forth a plan, then in progress by various parties in interest, for the reorganization and future management of the road. It sets out a series of transactions in connection with the funding of certain bonds secured by the mortgage, and seeks, by such allegations, to make Stern a party to the funding scheme, and to certain proceedings under which the proceeds arising from the sale of lands, which formed part of the mortgage security, were used by the parties in interest for the payment of interest on bonds and otherwise, and charges that Stern, by the prosecution of his independent suit, is interfering with the administration by the trustees of their trust, and with proceedings instituted for the common benefit and best interests of all the bond holders. The proposed plan of reorganization is also set out as an exhibit to the bill, and the prayer of the bill is that the trustees may be instructed by the court, in the execution of their trust, that the railroad company and Stern may be required to submit to the proposed plan of reorganization and issuance of new bonds; that such plan may be carried out, and that Stern may be enjoined from prosecuting any actions at law, or otherwise, upon his bonds and coupons. It should be added that on the sixth day of October, 1879, Stern interposed a demurrer to complainant's bill in the trustees' suit, and that no further proceedings have since been had in that suit.

Now to the amended bill in the Stern suit the railroad company and the defendant, Charles L. Colby, on the 30th day of August, 1879, filed a demurrer, and on the 6th day of October, 1879, the trustees, Stewart and Abbot, interposed a plea of the pendency of the previous suit brought by them, and denying the alleged frauds and breaches of trust set out in the amended bill, and accompanying their plea with an answer in aid thereof; and this case was brought to argument upon the sufficiency of this plea, as well in form as

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in substance, so that the case is now before the court upon the question of the sufficiency of the plea, and there is perhaps incidentally involved, though it was not argued, the demurrer filed by other parties.

Enough has been stated of the character and history of this litigation to show with sufficient accuracy the present *status* of this case and of the parties to the litigation. And the attitude of the case, as it now comes before us upon the amended bill and the demurrer and pleas thereto, would seem to be that of an independent measure, in course of regular prosecution and defence. As already stated, when the case was previously before us it was supposed by the court that the views then expressed would result in a transfer of this whole controversy to the trustees' suit, where, in our opinion, it rightfully belonged. That suit had been commenced by the trustees and was pending when Stern filed his independent bill.

The trustees' suit, as originally commenced, was one which involved the rights, equities and interests of all parties interested, and it then seemed to us that it would be an anomaly to have pending in the same court two such suits as these; one brought and prosecuted by the trustees under the mortgage, and the other by a single bond holder, and a review of the *status* of this controversy, in connection with the questions which directly arise under the issues made by the amended bill, and the demurrers and pleas, does not incline us to recede from the position first taken. There was much discussion upon the argument as to whether the nature of the suit brought by the trustees, especially in view of the character of their second supplemental bill, was such that it could be plead in bar of the Stern suit.

Whatever technical distinctions may be taken in this regard, we think it clear that no such relief as is asked in either of the bills filed in the trustees' suit could be granted without affecting the interests of the bond holders, and that no such relief could be granted to the complainant Stern, as is prayed in his bill, without affecting the trustees and other parties in interest. And we think it equally clear that this litigation

should proceed in one suit. To the trustees' suit, which was first commenced, Stern, as one of the bond holders, had a clear right to apply for admission, to contest the very matters which he sets up in his independent bill. It is true that he was not made a party to that suit until the second supplemental bill was filed, which was after he had filed his own bill, and that, in the nature of the relief asked, the supplemental bill is a radical departure from the relief sought by the original bill; but, notwithstanding this, we think it is not an effective obstacle to the assertion by Stern, in that suit, of his rights and equities, if he has any; and it would certainly be an anomaly, and a course of procedure which we could not sanction, to permit this litigation to go forward in its present form, in part in the trustees' suit, and in part in a suit subsequently commenced by a single bond holder.

The court has the power, we suppose, either to consolidate the two cases, or to stay the proceedings in one, thereby transferring the controversy to the other, and one or other of these courses we deem it the duty of the court to take. Something was said upon the argument to the effect that complainants in the trustees' suit had given such shape to that case, by proceedings subsequent to the original bill, that a foreclosure of the mortgage was rendered impossible, and that there could not be given to Stern in that suit the redress to which he deems himself entitled. We do not think so. It is not a question here as to which of the parties to this controversy shall or can be *dominus litus*. The litigation is under the control of the court, and, if need be, the court has the power and may rightfully assume the functions of that office.

That Stern, as a party to the trustees' suit, may answer the bills which are therein filed, and may interpose his cross-bill, and may by such appropriate pleadings bring fully before the court the matter set up in the amended bill in his suit, we cannot doubt, nor do we doubt the power of the court, upon a full presentation of all the equities in that suit, to adjudicate upon them as completely as it might do in any other form; and, in the action which we shall take with reference to these causes, it will be understood that it is not

intended by the court to curtail or prejudice any rights which Mr. Stern as a bond holder has in the premises. It is with the view of giving to him and to all other parties as complete and just adjudication of any rights and equities which they have, and at the same time maintain an orderly course of procedure, that we take the action now contemplated.

For the present the demurrer and pleas to complainant's amended bill will stand undisposed of. Proceedings in this case will be stayed until further order, with the right, however, reserved to complainant, if he shall so elect, to have the cases consolidated.

The litigation between these parties will be transferred to the trustees' suit, and complainant, Stern, will have the right, if he has not already done so, to take such suitable and apt proceedings in that suit as he may be advised, for the purpose of securing an adjudication of any rights to which he may be entitled.

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**KELLEY v. MISSISSIPPI CENTRAL R. Co.**

*(Circuit Court, W. D. Tennessee. March, 1880.)*

**CORPORATION—EXTINCTION—PLEA IN ABATEMENT.** Where certain persons were served with process as the representatives of an alleged corporation, the plaintiff cannot preclude them from pleading in their own names the extinction of such corporation.

*Humes & Poston*, for plaintiff.

*James Fentress and Wright, Folkes & Wright*, for defendants.

**HAMMOND, J.** The only question to be now determined is whether the persons named in the marshal's return shall be allowed to plead. The question here raised usually arises in some collateral way, and when it has been directly presented, as in this case, the courts are always beset with technical difficulties. On the one hand it is urged that a dead party cannot speak; that a non-existing thing cannot, without admitting the very question in dispute, plead in the manner it might if it did exist; while on the other hand it is said with

equal force that one not a party to a suit cannot be heard to interfere with it. In *Bronson v. La Crosse R. Co.* 2 Wall. 283, 292, it is said that generally other persons are not permitted to plead for a corporation, because of the inequality that would exist between the parties. The corporation not being before the court would not be bound by any judgment rendered on such pleas; but, lest there should be a reproach to the law, stockholders were permitted to plead for themselves, where the corporation had abandoned its defence and its trust.

Every corporation has officers who speak and act for it by authority of law, and process must be served on the proper officer, or the judicial proceeding is not binding. *Alexandria v. Fairfax*, 95 U. S. 774. Under the Tennessee Code a failure to elect officers does not dissolve corporations, and those last in office continue, and process may be served upon them; so, after dissolution, they continue for five years for the very purpose of prosecuting and defending suits. T. & S. Code, §§ 1481, 1493, 2831, 2834. If the defendant here has a qualified existence, under these provisions of the statute, there should be a plea by the corporation itself. In the absence of such statutes the tendency of modern decisions is to treat a corporation once existing as continuing to exist for the purpose of suing and being sued in winding up its affairs. *Pomeroy v. Bank*, 1 Wall. 23; *R. Co. v. Evans*, 6 Heisk. 607; *Shackelford v. R. Co.* 52 Miss. 159.

But we are met at the threshold with the question whether this defendant exists at all, for any purpose, as a question of fact to be ascertained in determining whether the plaintiff is entitled to a judgment by default. He insists that he has the right to take his judgment at the peril of its being void, if there be, in fact, no corporation. In England there can be no judgment by default without appearance, and if the defendant refuses to appear the plaintiff must enter appearance for him, and in doing so must make affidavit of proper service on the defendant. This may be contested by cross-affidavits, and motions to quash the service and the writ. 3 Chit. Prac. 264, 277, 280. In Alabama and other states the court will

not give a judgment by default against a corporation without a judicial finding, recited on the record, that the service has been of a character to bring the corporation into court. *Oxford Co. v. Spradley*, 42 Ala. 24; *Talladega Co. v. McCullough*, Id. 667. But we have no such reasonable requirements in Tennessee. The sheriff may simply return the process "executed," and the presumption is that it is regular and on the proper officer. Any party aggrieved has his remedy by action for a false return against the sheriff, or by bill in equity to set aside the judgment. *Wartrace v. Turnpike Co.* 2 Cold. 515; *Ridgeway v. Bank*, 11 Humph. 522; *Bell v. Williams*, 1 Head. 230; *Baxter v. Irvin*, Thomp. Cases, 175; *Gardner v. Barger*, 4 Heisk. 669, 671. But even in Tennessee one is not put to an action for a false return or a bill in equity to avoid a wrongful judgment. In *Graham v. Roberts*, 1 Head. 55, a writ against Garret Graham was served on Jared Graham, and the bill in equity of the latter to avoid the judgment was dismissed, because he did not appear to contest the judgment by default in the first instance.

In *Bank v. Skillem*, 2 Sneed, 698, a judgment by default was set aside in the affidavit, and in *Jones v. Cloud*, 4 Cold. 236-239, on the motion of one not a party to the record, and in both cases it was held not to be error. No Tennessee case has been found which shows how the alleged extinction of a corporation may be contested in a suit against it in its corporate name; and, until modified by the statutes above cited, the law was settled that upon the civil death of a corporation it could no longer sue or be sued, and could have neither officers nor stockholders; and the same would doubtless be the rule under these statutes after the five years of qualified *post mortem* existence have elapsed. *White v. Campbell*, 5 Humph. 37; *Hopkins v. Whitesides*, 1 Head. 33; *Ingraham v. Terry*, 11 Humph. 571; *Blake v. Hinkle*, 10 Yerg. 217; *Nashville Bank v. Petway*, 3 Humph. 522. It is said in *R. Co. v. Evans*, 6 Heisk. 607, that the question of extinction must be raised "by a plea in abatement, motion or other proceeding," but there is nothing to indicate by whom these may be taken. In this case, and uniformly, it is held that a

failure to make the question by some proper proceeding admits the corporate existence. The necessity, then, for some proceeding to abate the suit is obvious. If there be any appearance, except to make that contest, the matter is ended in favor of the existence, for afterwards all parties are estopped to deny it. *Muscatine v. Funk*, 18 Iowa, 469. The marshal cannot safely assume to determine the question and refuse to execute the writ, particularly in a case like this, where there has been a corporation which has issued bonds and built a railroad, and as to which there are outward and tangible evidences of continued existence.

The plaintiff may take a judgment at his peril, and if there be no corporation it is void, as we have seen. *Thornton v. Railway*, 123 Mass. 32. But I do not see that he is entitled to this as a matter of right, nor that the stockholders or others interested should be compelled to submit to such a judgment without a preliminary contest over the fact of corporate existence; because, if there be a corporation, the judgment by default is binding, and all opportunity to make other defences is gone. This throws on all interested the peril of determining the important question of existence for themselves, without the aid of judicial inquiry into the disputed facts, and is an immense advantage to a plaintiff; and it would, in my opinion, be a reproach to the law to permit it, upon any technical theory that the officers and stockholders are not parties, and therefore cannot plead in the suit. That they are not parties, even when served with process, cannot be denied. *Bronson v. La Crosse R. Co.* *supra*; *French v. Bank*, 7 Ben. 488; S. C. 11 N. B. R. 189; *Apperson v. Ins. Co.* 38 N. J. L. 272; *Blackman v. R. Co.* 58 Ga. 189.

How, then, can the defence be made? It is said in *Oxford Co. v. Spradeen*, 46 Ala. 98, that there is no precedent for a plea by a corporation of its own non-existence; that it is an inappropriate plea and an inconsistency in itself; but it is intimated in *McCullough v. Ins. Co.* Id. 376, that such a plea is permissible in cases of misnomer and dissolution. In *W. U. Tel. Co. v. Eyser*, 2 Cold. 141, Mr. Justice Belford says that such a plea by the corporation itself is not anomalous, and

is abundantly established by many respectable courts, and he concludes it is a plea in bar and may be joined with the general issue; but the majority of the court held it could be pleaded by the corporation neither in abatement nor bar; that such a plea was *felo de se*. See, also, *Gulf R. Co. v. Shirley*, 20 Kas. 660. Notwithstanding this, it will be found that the plea has been made by the alleged corporation itself in many cases. *Foster v. White Cloud*, 32 Mo. 505; *Hobich v. Folger*, 20 Wall. 1; *Boyce v. M. E. Church*, 46 Md. 359; *Greenwood v. R. Co.* 10 Gray, 373; *Dooley v. Gloss Co.* 15 Gray, 494; *Thornton v. Railway*, 123 Mass. 32; *Gott v. Adams Ex. Co.* 100 Mass. 320; *Inman v. Allport*, 65 Ill. 540; *Pilbron v. R. Co.* 5 M. G. & S. (57 E. C. L.) 440.

In Massachusetts it is held that the plea must be by the corporation, and that an officer or stockholder cannot make defence. *Townsend v. Freewill Baptist*, 6 Cush. 281; *Byers v. Franklin Co.* 14 Allen, 470; *Robbins v. Justices*, 12 Gray, 225. Yet in *Buck v. Ashuelot Co.* 4 Allen, 357, and *Foster v. Essex Bank*, 16 Mass. 245, the fact of non-existence was otherwise made to appear in the one case by one having no right to plead, and in the other by suggestion of counsel.

In *Callender v. Painesville Co.* 11 Ohio St. 516, the question was directly adjudicated. An officer, not even served with process, was allowed to file his affidavit and move to dismiss the suit, because the defendant had no corporate existence, the court holding that he was not an intruder; that a judgment against the company would be against all the members collectively, including him as an individual; and that any member, under the circumstances, might make the motion to dismiss, and be heard upon it. And in *Pilbrow v. Railway Co.* 54 E. C. L. 730, the right of the person served to make the defence was upheld. See, also, *Stevenson v. Thorn*, 13 M. & W. 149; *Stewart v. Dunn*, 12 M. & W. 655.

The defence was made by the persons served with process, pleading in abatement, in *Rand v. Proprietors*, 3 Day, 441; *Evarts v. Killingworth Co.* 20 Conn. 447; and *Express Co. v. Haggard*, 37 Ill. 465. And in *Elliott v. Holmes*, 1 McLean, 466, it was held that a person served with process against another

might make the defence either by such plea, or by suggestion of counsel. In *Quarrier v. Peabody Co.* 10 West Va. 507, it is said that a plea in abatement, by a corporation, should not be by attorney, but by the president, individually, to avoid the effects of appearance by the corporation; that a corporation should never plead in abatement in its corporate name.

Persons sued in a representative capacity, as executors, trustees, and the like, may plead that they hold no such relation. 1 Danl. Ch. 631; Story's Eq. Pl. 732. This is quite analogous to the situation of the parties here. It is true executors are parties to the writ, but only in their representative capacity; and where they plead "no such executor," it is their individual plea. So the head officer of the corporation, sued as such, may deny that he sustains that relation. *Stewart v. Dunn*, *supra*. And in *Stevenson v. Thorn*, *supra*, it was said that a person served with process is, for some purposes, at least, to be considered the defendant. And there is another analogy in the case of a judgment of outlawry, where, if the outlaw dies, the death may be pleaded by any person to release his property. 1 Tidd, 144. The defence of the non-existence of a corporation, sued as such, may also be made by an attorney in his own name, suggesting it on the record. *Greeley v. Smith*, 3 Story, 657; *Mumma v. Potomac Co.* 8 Pet. 281; *Pomeroy v. Bank*, 1 Wall. 23. Whether he be the attorney of the corporation must depend on whether it exists or not. If not, he must be the attorney of some one else having an interest in the matter; for a non-existing corporation cannot, in the nature of things, appoint an attorney under a common seal, and the dissolution would revoke any appointment already made.

The objections suggested against any method of making the defence come from pressing too far the doctrine that a corporation has an independent existence. This *ens rationis* called a corporation is, after all, only an incorporeal defendant, and it cannot, till its existence is established, have any independent *status* separate and apart from the personality of those composing it. To speak of it as dying is a somewhat false analogy. The law provides heirs, executors, or admin-



istrators for dead persons; but an extinct corporation must be represented by the individuals who originally composed it. They may employ attorneys, and, as a matter of fact, they are the real actors in any litigation with it. If it be alive, they must act in the corporate name; if extinct, they may so act, although it would be an inconsistency, or they may act in their own names. If sued in the corporate name, this would seem to violate the well known rule that none but parties can plead; but this results from assuming the very question in dispute in favor of the plaintiff, *i. e.*, that there is a corporation. If the question be assumed the other way, as the persons alleged to have a corporate existence must assume if they deny that fact, there is no difficulty in treating them as the real parties sued. The plaintiff here, by his argument, requires the court to adjudicate that a corporation does exist upon his bare allegation of the fact; and he would compel the persons supposed to constitute it to admit that fact by pleading in the corporate name, which he assumes they have. I do not think the rule of pleading relied on is so inflexible as to give the plaintiff this advantage. Either this case is an exception to it, or, for the purpose of trying this question, the persons alleged to be incorporated must be considered the real parties, notwithstanding the plaintiff's assumption of their corporate capacity.

In *Welch v. St. Genevieve*, 1 Dill. 130, the facts were presented by the return to a *mandamus* of individuals held to have no official connection with the corporation, and upon the suggestion of an *amicus curiæ* the question of extinction was tried. In *McGoon v. Scales*, 9 Wall. 23, the defence was made both by trustees not sued and the extinct corporation itself; and in *Bank v. Colby*, 21 Wall. 609, the motion to abate was made by a receiver.

The plaintiff having treated the persons served with process as representing the alleged corporation, he cannot preclude them from at least denying that there is such a corporation. Whether they do this in their own names or that of the alleged corporation is quite immaterial, but it seems to me

more reasonable not to pretend that there is a corporation, in order to deny that there is one.

The motion to strike out the pleas, and for judgment by default, is denied.

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KIMBERLING v. HARTLY and another.

(Circuit Court, E. D. Kansas. — — —, 1880.)

**EQUITABLE LIEN—FRAUDULENT CONVEYANCE BY JUDGMENT DEBTOR—BILL FILED BY JUDGMENT CREDITOR.**—Judgment, execution, and a return of *nulla bona* place the judgment creditor in a position to assail conveyances made by the judgment debtor to defraud his creditors, and the filing of a bill for that purpose, and the service of process in the action, create a lien in equity upon the lands described in the bill, and entitle the plaintiff to priority over other creditors.

**SAME—BANKRUPTCY.**—The lien thus created is not displaced by the subsequent bankruptcy of the judgment debtor, but is protected by the bankrupt act.

**ASSIGNEE IN BANKRUPTCY—SELECTION OF BANKRUPT'S PROPERTY.**—Assignees in bankruptcy are not bound to take all the property of the bankrupt, but may reject such as may be rather a burden than a benefit to the estate.

**BANKRUPTCY—JURISDICTION OF STATE COURT IN SUIT PENDING.**—Where an action is pending in a state court of competent jurisdiction to enforce a specific lien on property of the debtor, the subsequent bankruptcy of the debtor does not divest the state court of its jurisdiction to proceed to a final decree in the cause and execute the same. The assignee in bankruptcy may intervene in such action, but the jurisdiction of the state court and the validity of its decree is not affected by his failure to do so.

**ASSIGNEE IN BANKRUPTCY—ASSIGNMENT PENDENTE LITE—SUBSEQUENT PROCEEDINGS.**—The rule that one who purchases *pendente lite* is bound by the subsequent proceedings, is applicable to an assignee in bankruptcy, and to the transfer made by a bankruptcy proceeding.

On the 8th day of February, 1875, the defendant John Hartly, recovered judgment in the circuit court of White county, Arkansas, against Thomas J. Oliphant for the sum of \$280.27, upon which judgment execution was issued and returned *nulla bona*. November 22, 1875, the judgment creditor, Hartly, filed his bill on the equity side of the White county circuit court, alleging the above facts, and further alleging that the judgment defendant, Oliphant, was the owner

in fee of the real estate in controversy in this case, and that sometime prior to the rendition of the judgment in favor of Hartly he conveyed the same to his wife, Georgia Oliphant, with the limitation in substance that the land was to revert to him if his wife should die without children. The bill alleged this conveyance to his wife was voluntary, and made to hinder, delay and defraud his creditors, both existing and subsequent, and prayed that the property might be decreed to be sold to satisfy the plaintiff's judgment. Oliphant and his wife were made defendants to the bill. Oliphant was served with process the day the bill was filed, and afterwards appeared to the action.

In June, 1876, Oliphant was, on his own petition, adjudged a bankrupt by the district court of the United States for the eastern district of Arkansas. He did not schedule the property in question as part of his assets. Georgia Oliphant, the wife, died in July, 1876, and the action abated as to her, and the plaintiff and defendants in this action concede that, under the limitation in the deed, the legal title to the land reverted to Oliphant at her death. Oliphant's assignee in bankruptcy never asserted any claim to the property nor sought to become a party to the suit, and was not made a party, and was discharged by the bankrupt court before final decree in the case. Hartly never proved his judgment as a debt against the estate of the bankrupt. Oliphant never answered the bill, but before final decree filed his certificate of discharge in bankruptcy in the case, and moved to dismiss the cause for want of jurisdiction, and because his assignee in bankruptcy was not made a defendant.

On the twenty-seventh of January, 1877, a final decree was rendered in the cause, in accordance with the prayer of the bill. From this decree Oliphant appealed to the supreme court of the state, where the decree below was affirmed. *Oliphant v. Hartly*, 32 Ark. 465.

The property was sold under the decree, and purchased by Hartly, the plaintiff in that action, and one of the defendants in the present suit. Afterwards Oliphant, the bankrupt, conveyed the property to the present plaintiff, who

brought this action of ejectment to recover the property from the purchaser at the sale made under the decree of the state court. To the answer, which by agreement is to be taken as setting up with the requisite fullness and particularity the above facts in bar, the plaintiff filed a demurrer.

*T. J. Oliphant*, for plaintiff.

*B. D. Turner*, for defendant.

CALDWELL, J. The plaintiff contends that when Oliphant was adjudged a bankrupt the state court was without jurisdiction to proceed further in the pending cause, unless the assignee was made a party, and that, as that was not done, the decree of that court, and sale and conveyance thereunder, are nullities, and that, as the land reverted to Oliphant under the limitation in the deed to his wife, after he was adjudged a bankrupt, it was a new acquisition, and his deed invested plaintiff with the legal title. Judgment, execution, and a return of *nulla bona* thereon, placed the judgment creditor in a position to assail any conveyances made by the judgment debtor to defraud his creditors, and a bill was filed for that purpose, making the judgment debtor and the alleged fraudulent grantee defendants. Proper process issued and was duly served on the judgment debtor, to whom, under the limitation contained in the deed to his wife, it is conceded the legal title to the property reverted upon her death, which occurred soon after the institution of the suit, and after that event Oliphant was the sole proper defendant in the action.

By these proceedings the state court acquired complete jurisdiction over the parties to the suit, and the subject-matter of the action; and the plaintiff acquired a lien in equity on the lands mentioned in his bill, and the right, if he established the fraud, to subject them to the payment of his judgment. The law is well settled that the filing of such a creditor's bill, and the service of process in the action, create a lien in equity upon the lands described in the bill, and entitle the plaintiff to priority over other creditors. *Storm v. Waddell*, 2 Sandf. Ch. 494; *Tilford v. Burnham*, 7 Dand. 110; *Maffitt v. Ingham*, Id. 495; *Hartshorn v. Eames*, 31 Me. 93; *Newdigate v. Jacobs*, 9 Dana, 18; *McDurmott v. Strong*, 4

John. Ch. 687; *Spader v. Davis*, 5 John. Ch. 280; *Carr v. Farrington*, 63 N. C. 560; *Fetter v. Cirode*, 4 B. Mon. 482; *Day v. Washburne*, 24 How. 352; *Clark v. Rist*, 3. McLean, 494.

"It has been aptly termed an equitable levy." *Miller v. Sherry*, 2 Wall. 249. And this lien is not displaced by the subsequent bankruptcy of the judgment debtor, but is protected by the bankrupt act. Section 5075, Rev. St.; *Clark v. Rist*, 3 McLean, 494; *Sedgwick v. Mench*, 6 Blatch, 156; *Parker v. Merggridge*, 2 Story, 334; *Storm v. Waddell*, *supra*; *Carr v. Farrington*, *supra*; *Fetter v. Cirode*, *supra*; *Newdigate v. Jacobs*, *supra*; *McDurmott v. Strong*, *supra*; *God-dard v. Weaver*, 1 Wood, 260; *Yeatman v. Savings Institution*, 95 U. S. 764; *Stewart v. Platt*, U. S. Sup. Ct., October term, 1879, 12 C. L. N. 201.

Conceding that by the bankruptcy of the judgment debtor his assignee in bankruptcy acquired the right to make himself a party to the pending creditors' bill, and prosecute the same, it by no means follows that because he did not do so the state court was deprived of jurisdiction. The assignee succeeded to the right the creditors of the bankrupt or any one of them had, or might have obtained, by appropriate action, to avoid any conveyance made by the bankrupt in fraud of his creditors. But in any suit brought by the assignee for this purpose the creditors' liens on the property, whether acquired by creditors' bill or otherwise, would not be displaced or annulled; and, if the suit was successful, the assignee would have to distribute the fund according to priority of liens and right between the creditors. And if the property did not exceed in value the amount of Hartly's lien upon it, and other creditors would derive no benefit from the suit, the assignee acted wisely in not intervening and allowing the lien creditor and the bankrupt to settle the controversy between themselves in the state court without expense to the estate.

"Assignees are not bound to take *all* the property of the bankrupt, but may reject such as may be rather a burden than a benefit to the estate." 1 Deacon on Bank. 535;

*Amory v. Lawrence*, 3 Clifford, 523, *et seq.*; *McLean v. Rocky*, 3 McLean, 235; *Rugely & Harrison v. Robinson*, 19 Ala. 404, 417; *Glening v. Langdon*, 98 U. S. 20, 30; *In re Lambert*, 2 Bank. Reg. 138.

The judgment creditor filed his bill, had a subpoena served, and thereby acquired a lien before the commencement of proceedings in bankruptcy. He did not prove his debt against the estate of the bankrupt, or in any manner voluntarily submit himself to the jurisdiction of the bankrupt court, but was allowed to proceed to enforce his lien without objection from that court or the assignee. In this state of the case the state court had a right and it was its duty to proceed with the cause; its jurisdiction was complete, and its decree and the title acquired under it are as valid and effectual as if the bankruptcy of the defendant had not intervened. *Sedgwick v. Mench*, 6 Blatch. 156; *Clark v. Rist*, 3 McLean, 494; *In re Davis*, 1 Sawyer, 260; *Goddard v. Weaver*, 6 Bank. Reg. 440; *Second Nat. Bk. v. Nat. St. Bk.* 10 Bush. 367; S. C. 11 Bank. Reg. 49; *Davis v. Railroad Co.* 1 Wood, 661; *Norton's Assignee v. Boyd*, 3 How. 426; *Townsend v. Leonard*, 3 Dill. 370; *Johnson v. Bishop*, 1 Wood, C. C. R. 374; *Reed v. Bullington*, 49 Miss. 223; S. C. 11 Bank. Reg. 408; *Waller's Assignee v. Best*, 3 How. 111.

Cases holding a contrary view have been cited in the argument; but all doubts and conflict of authority upon the question have been removed by the authoritative judgments of the supreme court of the United States. *Marshall v. Knox*, 16 Wall. 551; *Doe v. Childress*, 21 Wall. 642; *Eyster v. Gaff*, 91 U. S. 521.

In *Dorr v. Childress* the facts were that the land was attached in a suit in the state court in April, 1867, and that the defendant was declared a bankrupt in February, 1868, four months before a decree was obtained in the suit, and seven months before the sale took place under the decree, and the court said: "The Tennessee court of chancery having jurisdiction of the subject of the proceeding in the attachment suits, no defence being interposed by the assignee in the state court, and no means having been taken to arrest their

proceedings, or to transfer them to the bankrupt court, (if power to take such steps existed,) and there being no fraud proven or alleged, we are of opinion that a good title was obtained under the decree of sale made in the state court."

In *Eyster v. Gaff* the facts were that a suit to foreclose a mortgage was commenced in the state court in 1868; that the mortgagor and defendant in the suit was adjudged a bankrupt in May, 1870, and that a decree was rendered in the foreclosure suit in the state court in July, 1870, upon which the property was sold. The bankrupt's assignee did not intervene and was not made a party. The court held that the state court had jurisdiction, and that the decree and sale were valid. Mr. Justice Miller, delivering the opinion of the court, said: "It is almost certain that if at any stage of the proceedings, before sale or confirmation, the assignee had intervened, he would have been heard, to assert any right he had, or set up any defence to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or take part in the case, deserved no attention and received none. In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. \* \* \* This court has steadily set its face against this view."

There is nothing in the case of *Gleaning v. Langdon*, 98 U. S. 20, that conflicts with these views. In that case a creditor, after his debtor had been adjudged a bankrupt, brought a creditor's bill to recover property conveyed by the bankrupt in fraud of his creditors, alleging, as ground for doing so, that the assignee refused to bring the suit, and for that reason making the assignee a defendant. The creditor had no lien on the property, and suit was brought after the adjudication in bankruptcy and the appointment of an assignee, and the court say that in such case the assignee must bring the suit, and point out the proper mode of proceeding by the creditors, in the event that he wrongfully refuses to do so. There was no *lis pendens* and no lien in that case before

the bankruptcy, and the property and right of action passed absolutely to the assignee, and he alone had the right to sue.

In the case at bar there was a *lis pendens* and a lien, and the creditor had a right to proceed to satisfaction in the state court unless he was stayed by some appropriate affirmative action of the assignee or the bankrupt court. The distinction in the two cases is obvious, and is clearly pointed out in *Winters v. Claiton*, 54 Miss. 341; S. C. 18 Bank. Reg. 533.

The rule is well settled that an assignee *pendente lite*, whether he be the claimant of a legal or equitable interest, or whether he be the assignee of the plaintiff or of the defendant, need not be made a party to the bill, and is bound by the decree. Story's Eq. Pl. § 156.

It is generally true that this rule does not apply to assignments by mere operation of law, and it has been held not to apply to an assignee in bankruptcy of the defendant. Story's Eq. Pl. § 158a; *Lowry v. Morrison*, 11 Paige, 237. But the supreme court of the United States, in *Eyster v. Gaff*, *supra*, seems to place assignees in bankruptcy, so far as relates to pending suits to enforce liens on the bankrupt's property, on the same footing as a purchaser *pendente lite*. The court say: "We see no reason why the same principle [that one who purchases *pendente lite* is bound by the subsequent proceedings] should not apply to the transfer made by a bankrupt proceeding."

In that case, as we have seen, pending an action to foreclose a mortgage, the mortgagor was adjudged a bankrupt, and the court, after stating that the assignee might have made himself a party, say that "if he chose to let the suit proceed without such defence he stands as any other person would on whom the title had fallen since the suit was commenced." And see *Carr v. Farmington*, 63 N. C. 560.

The discharge of the bankrupt pending the suit did not discharge or impair the lien acquired by the commencement of the suit. A decree *in personam*, against which the discharge, if properly pleaded, would have been effectual, was not sought or rendered, and the discharge was unavailing against  
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a proceeding *in rem* to subject property to the satisfaction of a lien antedating the commencement of proceedings in bankruptcy.

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KILGORE v. CROSS & DIVER.

(Circuit Court, E. D. Arkansas. ———, 1880.)

**CONTRACT—MENTAL CONDITION.**—Facts upon which it was held the mental condition of a party was such as to incapacitate him to enter into a valid contract.

**SAME—IMPOSITION—EQUITABLE RELIEF.**—Against the consequences of mistaken judgment, or mere imprudence and folly on the part of one making a contract, courts can grant no relief. But the acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented or overcome by cunning artifice or undue influence.

**SAME—EXERCISE OF REASONING FACULTIES.**—A party is not barred by a contract entered into when his mental condition is such as to preclude any fair or reasonable exercise of the reasoning faculties.

**SAME—INCAPACITY—EXPERT TESTIMONY.**—Opinions of witnesses not experts are competent evidence on the question of capacity or incapacity to make a contract, when the facts or circumstances are disclosed on which they found their opinions.

CALDWELL, J. The plaintiff was the owner, among other property, of five head of horses, two sets of double harness, and one Concord eight-seat stage coach or wagon. He desired to sell or exchange this property, and having been informed that Cross & Diver, the defendants, had obtained a contract for carrying the United States mail, and were running a street railway in Little Rock, and that they would probably purchase the property, he caused inquiry to be made of them on the subject and received an answer, in substance, that if he would bring his property from Hot Springs, where plaintiff then was, to Little Rock, they might purchase or trade for it. Encouraged to believe that he could dispose of his property to the defendants, the plaintiff, on the fourteenth day of July, 1878, started from Hot Springs to Little Rock with his stage

coach, drawn by four horses, himself driving. In or near Hot Springs the horses drawing the coach took fright, ran away and overturned the coach, seriously injuring the plaintiff. The extent and character of this injury is the turning point in this case and will be more fully considered hereafter.

On the next day after he received his injury the plaintiff directed one of his hired men to take his coach and five horses to Little Rock and sell or trade them at his discretion, and on the sixteenth of July his hired man proceeded to Little Rock with the property upon the understanding that he was to sell or dispose of the same for the plaintiff according to his own discretion, unless the plaintiff should, himself, go to Little Rock by rail the next day.

On the seventeenth of July the stock and coach arrived at Little Rock, and were put up at defendants' stable, and in the afternoon of the same day the plaintiff arrived by rail. The next day the plaintiff and defendants effected an exchange of property, as follows: the plaintiff gave the defendants his five horses, two sets of harness, and stage coach and \$150, for an old glass front Clarence carriage. The \$150 was not paid in money, but the plaintiff gave his notes for that sum; and, to secure its payment, executed to defendants a mortgage on the carriage. The defendants loaned plaintiff a span of horses to haul the carriage which he received in the trade to Hot Springs, and it was driven to the latter place by the plaintiff's hired man.

The plaintiff arrived at Hot Springs with the carriage on the nineteenth or twentieth of July, and within a week thereafter returned to Little Rock with the carriage, and tendered it back to the defendants and demanded a return of the property which they had received from him for the carriage, upon the ground that at the time he made the trade he was *non compos mentis*.

The defendants refused to rescind the trade, and thereupon the plaintiff filed his bill, alleging that by reason of the injury plaintiff received when thrown from his coach he was, at the time of the trade, incapable of transacting business, or knowing what he was doing, and was in fact *non compos mentis*;

and that defendants, knowing his condition, fraudulently worried and bewildered him, by artful language and constant offers and proposals, until they finally induced him to make the trade. The bill prays for a rescission of the contract and a return of the property, or judgment for its value.

There is much conflict in the evidence in relation to the value of the property included in the trade, the valuation of plaintiff's property by the witnesses running from \$650 to \$1,400, and of the defendant's carriage from \$250 to \$800, but the weight of evidence warrants the conclusion that the property which defendants received from the plaintiff was worth, at a fair cash valuation, \$750, exclusive of the mortgage for \$150, and that on a like scale of cash valuation the carriage which plaintiff received from the defendants was not worth at most over \$400. In other words, the plaintiff agreed to pay for the carriage more than twice its value in this or any other market, and this disparity in the value of the property given and received does not disclose the extent of the plaintiff's improvidence and folly in making the trade, for the only use plaintiff had for the carriage, and the use to which he expected to put it, so far as he had any comprehension on the subject, was that of a public hack or carriage to carry passengers in and about Hot Springs. Its age and construction rendered it unfit for such service on the rough and rocky roads of that region, and at that place and to the plaintiff it was worth but little more than the amount of the mortgage lien retained upon it by the defendants.

The evidence as to the mental condition of the plaintiff at the time he made this contract is voluminous and somewhat conflicting, but the weight of evidence establishes these facts: That the plaintiff, for some years preceding the making of this trade, had been first a stage driver, and afterwards a mail contractor and proprietor of horses and mail coaches, and that for some months immediately preceding the trade he had been at Hot Springs engaged in keeping hacks and other vehicles and teams for carrying persons and hauling freights for hire. In the conduct of this business he employed two or more teamsters, and was unusually diligent

and careful in the direction and management of his business, and the care of his property, attending at the stable where his stock was kept early and late, exacting from his hired men the strictest attention to their duties, constantly supervising them himself, and seemingly indisposed to trust the care and management of his stock to any one. He was a good judge of vehicles of all kinds and horses, and knew their value; was a shrewd and close trader in such property, and those who dealt with him had to pay full value for what they got. When his team ran away with him on the fourteenth of July, and upset his coach, he was thrown from the driver's seat, and his head and other parts of his body struck the ground with considerable force. He was conveyed to his boarding house, and Dr. Barry, a respectable physician, of more than 20 years' practice, called to see him. The doctor found him suffering from concussion of the brain, and a painful injury to the foot or ankle-joint. He was then, in the language of the doctor, "partially delirious, and his acts and speeches indicated a deranged condition of mind." The doctor saw him no more, but he testifies that the condition of mind in which he found him might have continued 10 or 15 days, and other witnesses testify that there was no change in his condition up to the time the trade was made. Those who were with him during this time testify that he begged them to kill him, threatened to commit suicide, seemed utterly indifferent as to what became of his property; that he was in this condition when he directed his hired man to take his property to Little Rock and dispose of it; that he was in this condition when he arrived at Little Rock, and during all the time he remained there; that he had to be assisted in and out of the hack, and could walk with difficulty by the aid of crutches; that he seemed to be suffering intense pain from his injuries, and had to be watched while in bed at night; that the night after he got to Little Rock, in the absence of his watchers, he got out of his bed, and went out in town at one or two o'clock in the morning to find a purchaser for his property; that against the earnest protest and advice of his hired man he made the trade in question that morning; that

he exaggerated the value of the carriage he got, saying it was worth \$10,000, and that the speaking tube, extending from the inside of the carriage to the driver's seat, was worth \$500. Other acts and speeches of plaintiff are detailed by the witnesses, going to show his reasoning faculties were more or less deranged. His condition remained the same for four or five days after the trade, when his mind seemed to be restored to its normal condition, and he inquired for his property, and seemed quite confounded when told he had traded it for the carriage. He testifies that he has no knowledge or recollection of anything that he said or did from the fourteenth of July, the date he received his injury, until the twenty-second day of that month.

Persons who saw the plaintiff casually during this time testify that they observed nothing in his speech or action to indicate that he was not sane; but those who were well acquainted with him, and who were with him much before and after the injury, and who had the best opportunity of forming a correct opinion on the subject, agree in saying he was not in his right mind, and was utterly incapable of transacting business, or forming or exercising a deliberate and intelligent judgment on any subject.

Opinions of witnesses not experts are competent evidence in cases where the object is to prove capacity or incapacity to make a contract when the facts or circumstances are disclosed on which they found their opinions. *Kelly's Heirs v. McGuire*, 15 Ark. 555, 601.

In answer to a hypothetical question, which fairly stated the plaintiff's condition as disclosed by the evidence, Dr. Barry gives it as his opinion that the facts indicate a deranged condition of mind at the time the trade was made.

One of the physical causes of insanity is severe injuries to the head from blows, causing concussion of the brain. The evidence satisfactorily establishes the fact that the fall plaintiff received produced concussion of the brain, and that this condition continued until after the trade with defendants.

Against the consequences of mistaken judgment or mere imprudence and folly on the part of one making a contract

courts can grant no relief. If the party was capable of entering into a contract, and there was no fraud, it is binding, though it may be obvious that he acted improvidently, and paid for property purchased greatly more, or received from property sold greatly less, than it was worth.

It is impossible to define with exactness the degree of unsoundness of mind that renders a party incapable of entering into a binding contract. Weakness of understanding, or that deficiency of intellect which errs in judgment and easily makes mistakes, is not enough of itself to avoid a contract. But the acts and contracts of persons who are of weak understanding, and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justifies the conclusion that the party has not exercised a deliberate judgment, but has been imposed upon, circumvented, or overcome by cunning artifice or undue influence. 1 Story Eq. Jur. § 238.

In *Kelly's Heirs v. McGuire*, 15 Ark. 555, 603, the court say: "If a person, although not positively *non compos* or insane, is yet of such great weakness of mind as to be unable to guard himself against imposition or resist importunity or undue influence, a contract made by him under such circumstances will be set aside;" and in *Beller v. Jones*, 22 Ark. 92, 99, the court said: "No evidence was introduced by Jones so effective, none could be introduced more convincing, to show mental derangement or want of natural sense as is the agreement itself charged by him and admitted by Beller to have been made."

It must be conceded that the contract from which the plaintiff seeks to be relieved cannot be said to be so grossly improvident as in itself to justify the conclusion of insanity on his part, or fraud on the part of the defendants; nevertheless, its improvidence and folly are an important circumstance, tending to strengthen the conclusion, supported by the evidence, that his mental capacity was not adequate to the making of a valid contract, for it shows that in the very matter under consideration he did not act like a sensible or sane man, but quite the contrary.

It is obvious from the evidence that the plaintiff, at the very time he made this trade, ought to have been in his bed receiving proper medical treatment for his injuries; and he probably would have been there if the purpose of visiting Little Rock to dispose of his property had not been the one thought fixed in his mind and in course of execution at the moment of the injury. In his delirious condition, after the injury, he fancied that purpose must be carried out; and his trip to Little Rock, while laboring under concussion of the brain, and suffering excruciating pain from the injury to his ankle, was itself an insane act, or at least an act that no man in the full possession of his senses would have attempted.

A party is not bound by a contract entered into where his mental condition is such as to preclude any fair or reasonable exercise of the reasoning faculties. While the plaintiff's injuries did not produce a total eclipse of his mental faculties, they did so weaken and derange them that he was not capable of comprehending the subject of the contract, and its nature and probable consequences, and he is not, therefore, bound by it. It is a fortunate circumstance that the carriage received by plaintiff from the defendants has been securely housed during this litigation, and that it remains in the same condition as when plaintiff received it, so that defendants can be placed *in statu quo*. The defendants having parted with the property received from the plaintiff must account for the fair cash value of the same at the time the trade was made, which is found to be \$750, and 6 per cent. interest on the same to date of decree.

The cross-bill of defendants, seeking to foreclose the mortgage on the carriage, given to secure the \$150 "boot money," must be dismissed, and the defendants required to surrender the notes and mortgages for cancellation, and to pay all costs.

## IN THE MATTER OF THE ERIE ROLLING MILL COMPANY.

(District Court, W. D. Pennsylvania. February 5, 1880.)

**BANKRUPTCY—ORDERS FOR GOODS IN FAVOR OF LABORERS—PREFERRED CLAIMS—REV. ST. § 5101.**—Orders for goods, drawn by a manufacturing company in favor of their employes, are not preferred claims in the hands of the drawee, against the estate of the bankrupt company, within the meaning of section 5101 of the Revised Statutes, or the act of assembly of the state of Pennsylvania (April 9, 1872; Pur. Dig. 1464;) relating to wages and money due for labor.

**In Bankruptcy.**

*Sur* petitions of H. V. Claus and of Julius Heffner for orders on the assignee to pay certain alleged labor claims as preferred claims.

ACHESON, J. Section 5101 of the Revised Statutes gives a priority to "wages due to any operative, \* \* \* to an amount not exceeding \$50, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy."

The Pennsylvania act of assembly of April 9, 1872, (Pur. Dig. § 1464,) provides that "all moneys that may be due, or hereafter become due, for labor and services rendered by any miner, mechanic, laborer or clerk, for any period not exceeding six months immediately preceding the sale and transfer of any manufactory," etc., shall be a lien thereon and preferred in the distribution of the proceeds of the sale thereof; no such preferred claim of any miner, mechanic, laborer or clerk to exceed \$200.

The petitioners, H. V. Claus and Julius Heffner, respectively claim the benefit of the above cited statutory provisions. The assignee refuses to recognize the validity of these claims, and the court is asked to make an order directing the payment of said claims as preferred debts.

The facts, as they appear from the petitions and the statements of the petitioners' counsel, are as follows: Prior to its bankruptcy the "Erie Rolling Mill Company" issued to its operatives, on account of their wages, orders in writing, of which the following is a specimen, viz.:



"No. 573.

"ERIE, PA., October 12, 1875.

"Pay to Mr. J. Heffner, or bearer, five dollars in goods, and charge to

"\$5.

ERIE ROLLING MILL CO."

The petitioners each hold a number of such orders, and they are the basis of their claims to preference. The petitioners were merchants at Erie, and upon the presentation to them of the said orders, by the operatives to whom they were issued, paid the latter the amount of the orders in goods. Under this state of facts is the claim to preference which the petitioners set up well founded. It is not pretended that they themselves are operatives or laborers. Can they be regarded as assignees of the operatives, or entitled to stand in the shoes of the latter by substitution? It is certain that the petitioners have no formal assignment of these claims, and there is nothing to show that the operatives intended to assign them. Such intention, it seems to me, is not to be presumed. To keep such liens alive, in favor of parties paying the orders, might be highly prejudicial to the laborers; for these orders, in the hands of the merchant paying them, if still alive, might come in competition with the claims of the laborers themselves for preferences under the law.

In my judgment the true view of the case is this, that when the petitioners paid the orders in question by furnishing goods to the operatives, the labor claims were extinguished, and the Erie Rolling Mill Company became debtors to the petitioners, respectively, for the amount of goods furnished to the operatives pursuant to said orders.

And now, to-wit, February 5, 1880, the rules to show cause why the petitioners' claims should not be paid as preferred claims are discharged, and said petitions are dismissed.

MARGARET RUCKMAN, by her next friend, etc., v. RUCKMAN  
and others.

(Circuit Court, D. New Jersey. April 6, 1880.)

REMOVAL OF CAUSE—ACT OF MARCH 3, 1875—UNNECESSARY PARTY.—In a suit in equity to determine the ownership of a bond and mortgage, the mortgagor is not, under the circumstances of the case in controversy, a necessary party defendant, and, therefore, the suit may be removed, under the act of March 3, 1875, where all the other defendants join in the petition for removal.

SAME—GROUND OF REMOVAL—PETITION.—A cause may be removed under the act of March 3, 1875, where the whole record discloses a case over which the court has jurisdiction, although the ground of removal be erroneously alleged in the petition.

Motion to Remand.

*Robert Allen, Jr.*, for petitioner.

*Jacob Weart*, for complainant.

NIXON, J. The suit is brought by Margaret Ruckman, wife of one Elisha Ruckman, a citizen of the state of New York, by her next friend, Samuel M. Hopping, a citizen of the state of New Jersey, against Elisha Ruckman, a citizen of the state of New York, and John F. Boylan and James H. Marley, citizens of the state of New Jersey.

The case differs from the suit by the same complainant against the Palisade Land Company and others,\* which I have just considered, from the fact that one of the defendants, (Boylan,) who petitions for the removal, is a citizen of a different state from that of the complainant, and seems to be "actually interested" in a controversy which is wholly between him and her, and which can be "fully determined as between them."

The bill sets up, in substance, that the complainant is the wife of the defendant Ruckman, now living in a state of separation from him; that he was a man of large wealth, and began in the year 1877 to make settlements of his estate upon her by placing loans in her name, and having bonds and mortgages made to her, and having other bonds and mortgages assigned to her to hold as her separate estate; that in

\**Ante*, 367.

the month of September, 1878, he loaned to the defendant James H. Marley \$5,000, with the promise to complainant that the bond and mortgage to be given by Marley as security for the loan should be made directly to her as part of said settlement; that the bond and mortgage were in fact executed by Marley and wife to John F. Boylan, who shortly afterwards, in pursuance of an understanding and agreement with her husband, signed, sealed and acknowledged an assignment of the same to the complainant, whereby the title to the mortgage became vested in her; that afterwards, on demand, he refused to surrender the papers to her, claiming ownership in himself, by purchase for valuable consideration from Elisha Ruckman, which she charges is a mere contrivance between the defendant Boylan and her husband to deprive her of the benefit of the gift.

The prayers of the bill are, (1) that the defendant Elisha Ruckman may be decreed to pass over to the complainant the bond and mortgage, if the same are in his possession or under his control; (2) that the defendant John F. Boylan may be decreed to deliver up to complainant the bond, mortgage and assignment thereof, if the same continue in his possession or under his control; (3) that if the assignment heretofore made by the said Boylan to the complainant has been destroyed, he may be decreed to execute and surrender to her a second assignment, so as to fully vest the legal title in her; (4) that as between the complainant and defendants Elisha Ruckman and John F. Boylan, and every person who has obtained a secret interest in the bond and mortgage, a decree may be made vesting the title, and the debt secured by the same, in the complainant; and (5) that it may be decreed in what sum the said Marley was indebted to the complainant upon said bond and mortgage, and that he may be protected by a decree from all loss in the payment of the mortgage debt to the complainant.

The answer of Boylan admits the due execution of the bond and mortgage to him by Marley and wife, and states that he had no interest in the transaction at that time, as Ruckman furnished the money for the loan; that he understood, either

from his father or Ruckman, that the object in taking the mortgage in his name was to avoid any liability to attachment of the debt by one Burgholtz, a judgment creditor of Ruckman; that at the request of Ruckman he executed and delivered to him, about the same time, an assignment of the bond and mortgage to the complainant; that Ruckman held them until February or March, 1879, when he proposed to return to him the assignment of said bond and mortgage, cancelled and destroyed, and to redeliver to him the bond and mortgage, in consideration that he (Boylan) should give to him his promissory notes for the said sum of \$5,000, bearing even date with the bond and mortgage, and payable in one year; that, regarding the bond and mortgage as a good investment, he accepted the offer, delivered his notes in good faith, and took the papers in his possession as his own property, and that he still holds the same.

It thus appears that the subject-matter of the suit is the ownership of the bond and mortgage, which is claimed by the complainant on the one hand, and by Boylan on the other. They are citizens of different states. The pleadings reveal a controversy in the suit "wholly between them," and which can be "fully determined as between them," and in which the petitioner Boylan "has an actual interest."

These facts bring it within the second clause of the second section of the act of 1875, unless it ceases to be a suit between citizens of different states, because there happens to be other defendants in the cause, one of whom is a citizen of the same state with the complainant.

This question may still be regarded as an open one, although the tendency of judicial opinion is in favor of the jurisdiction of the courts of the United States in such a case. The congress, in its last legislation on the subject, adopted, substantially, the language of the eleventh section of the third article of the constitution, and thus seemed to design to confer upon the circuit court all the jurisdiction which the constitution warranted. I had occasion to examine the question with some care, in a recent case, and I came to the conclusion that when the real controversy in a suit was

between citizens of different states, these parties were entitled to have the cause adjudicated by the courts of the United States, although there might be other persons in the suit who were citizens of the same state with a person or persons on the opposite side. *Bank of Dover v. Dodge, Meigs et al.* 25 Int. Rev. Rec. 304.

To the same effect was the opinion of Judge Drummond, in *Osgood v. The Railroad Company*, 6 Biss. 339, in which he says: "If the whole suit is removed because of the principal controversy between citizens of different states, and in order fully to determine that, as between them, other controversies between citizens of the same state arise in the suit, there is no objection to the federal court taking jurisdiction of the latter. It is a matter of common practice to do this in the settlement of legal and equitable rights. Having control and jurisdiction of the principal, the incidents go with it." And see *Taylor v. Rockefeller*, 18 Am. Law Reg. (N. S.) 309.

There is another view of the case, which, perhaps, will sustain the removal.

The petitioners are Ruckman and Boylan. The only other defendant is the mortgagor, Marley, and he can hardly be regarded as a necessary party to the suit. He certainly has no interest in the controversy between the other parties. The object in bringing him in was to obtain an order restraining him from paying the mortgage debt to any one until the question of ownership was determined. Such injunction was obtained upon filing the bill. He has not answered, and in regard to him the only decree asked for is that he may be protected by the court, in the event of his paying the bond and mortgage to the complainant. It is of no importance to him whether the final decree shall declare the complainant or Mr. Boylan to be the owner. He has the money to pay only once, and he will be entitled to the surrender and cancellation of the mortgage when that payment is made.

It is a well settled principle that the jurisdiction of the court of the United States cannot be defeated in cases of this sort by joining unnecessary parties. *Wormly v. Wormly*,

8 Wheat. 421. In *Wood v. Davis*, 18 How. 469, the supreme court says "that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction if the citizenship or character of the real parties be such as to confer it within the eleventh section of the judiciary act."

If then, as here, all the defendants who are actual parties to the controversy in the suit join in the petition, may not the removal take place under the first clause of the section, in which the conditions of removal are that the suit shall embrace a controversy between citizens of different states, and one or other of the parties shall petition for the removal?

The suggestion was made on the argument that as the petition for removal alleged as authority for the same one of the grounds stated in the first clause of the second section of the act, if the court found, upon inquiry, that the cause did not fall within these provisions, it should be remanded, without looking further and ascertaining whether the record disclosed any other ground on which the removal could be based.

I do not so understand the law. The question in this court is not whether the counsel for the petitioners comprehends and assigns the true reasons for the removal, but whether the whole record reveals a case over which the court has jurisdiction. No matter how irregularly the petition brings up the suit, when it is here the only question is whether it involves a controversy properly within the jurisdiction of the court. If it does, it will not be remanded because a mistake was made by the counsel of the petitioners in assigning grounds for the removal which prove to be untenable. Such is a fair construction of the provisions of the fifth section of the act, and such, I understand, was held to be the law by Judge Drummond, in *Osgood v. The Ry. Co.* 6 Biss. 386.

The motion to remand is denied.

## ANSHUTZ v. HOERR.

(Circuit Court, W. D. Pennsylvania. February 17, 1880.)

**BANKRUPT ACT — "INSOLVENCY" DEFINED.** — "Insolvency, within the meaning of the bankrupt act, means inability to pay debts in the ordinary course of business, and unless the debtor is able to pay such debts as they mature, *with money*, he is insolvent in the contemplation of said act, notwithstanding he may have lands and goods sufficient in time to meet all his liabilities."

**SAME—FRAUDULENT JUDGMENT—EXECUTION—ACTION BY ASSIGNEE FOR PROCEEDS OF SALE.**—An assignee in bankruptcy may maintain an action against a judgment creditor of the bankrupt, for the proceeds or value of property sold under a judgment of the state court, where such judgment was obtained in fraud of the bankrupt act, although the property was subject, at the time of the sale, to the lien of a valid execution, subsequent to that of the defendant.

**ACTION BY ASSIGNEE—AMOUNT OF DEFENDANT'S LIABILITY.**—In such action the defendant is only liable for the amount of the fund received by him, where part of the proceeds of the execution sale went to satisfy the claim of another creditor.

Opinion *sur* motion for a new trial, and on questions of law reserved.

*P. C. Lazear* and *D. T. Watson*, for plaintiff.

*R. B. Petty* and *J. F. Slagle*, for defendant.

**ACHESON, J.** This is an action on the case brought by Theodore F. Anshutz, assignee of Nicholas Wurzel, Sr., a bankrupt, against Philip Hoerr, to recover the value of certain personal property of the bankrupt, seized and sold by the sheriff of Allegheny county, by virtue of an execution from the court of common pleas No. 1, of said county, upon a confessed judgment in favor of Hoerr, alleged to be void under the bankrupt law, as giving an unlawful preference.

The case was tried before the late Judge Ketcham, and a verdict rendered for the plaintiff for the sum of \$1,675, subject to the opinion of the court upon questions of law reserved. The defendant having moved for a new trial, that motion and the reserved questions were argued before me.

The ground mainly relied on in support of the motion for a new trial is the supposed error of the court in affirming the plaintiff's second point, which was in these words: "That

insolvency, within the meaning of the bankrupt act, means inability to pay debts in the ordinary course of business; and, unless the debtor is able to pay such debts as they mature, *with money*, he is insolvent in the contemplation of said act, notwithstanding he may have lands and goods sufficient, in time, to meet all his liabilities."

Nicholas Wurzel, Sr., was a *merchant*, and, therefore, as applicable to him, the foregoing point contains an accurate statement of the law. *Hardy v. Clark*, 3 B. R. 387; *Webb v. Sachs*, 15 B. R. 168; *Foot v. Martin*, 13 Wall. 47. In the last cited case the judge below charged the jury that, "if the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent." This instruction was approved by the supreme court as applied to traders and merchants.

It seems to me the reasons assigned for a new trial are insufficient, and the motion is overruled.

In order properly to understand the questions of law reserved, it is necessary to state the following facts:

Philip Hoerr's judgment against Wurzell was for the sum of \$790.96. It was entered and execution issued thereon December 22, 1875. On the same day, but at a later hour, August Klein entered judgment and issued execution against Wurzell for \$1,500. The day following, Lindsay, Sterrett & Co. entered judgment and issued execution against Wurzell for \$2,200. Under and by virtue of these three executions the sheriff seized and sold the personal property, consisting mainly of his stock of merchandise of the defendant Wurzell. The amount realized by the sheriff's sale was \$1,301.98, which the sheriff appropriated and paid as follows, to wit:

To costs,	-	-	-	-	\$223 90
" Philip Hoerr,	-	-	-	-	803 46
" August Klein,	-	-	-	-	274 62

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\$1,301 98

The assignee of the bankrupt claims that the Klein judgment and execution were in fraud of the bankrupt act, and  
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he brought a suit, now pending in this court against Klein, to set aside the alleged unlawful preference acquired by him. But it is conceded on all hands that the judgment and execution of Lindsay, Sterrett & Co. were valid and unimpeachable.

At the trial of this case the defendant, Hoerr, prayed for the following instructions, viz.:

"4. That the levy and sale by the sheriff having been made before commencement of proceedings in bankruptcy upon other executions, issued upon judgments which were unquestionably good and valid under the bankrupt law, the said sale cannot be impeached; and the only claim the assignee could make would be to the fund realized from the sale, and the defendant would only be liable for the amount of the fund received by him.

"5. That the evidence showing that the execution of Lindsay, Sterrett & Co. would have been entitled to the fund produced by the sheriff's sale, if execution of defendant was set aside, the assignee could have no interest in said fund, and cannot recover.

"6. That the sale of the sheriff having been regular, and having taken place before proceedings in bankruptcy were commenced, the assignee should have made his claim to the state court, which had jurisdiction of the fund, and the money having been distributed according to law in said court, its judgment cannot now be impeached.

"7. That the declaration in this case claims the value of the goods as damages, and the said goods having been sold by due process of law, under a judgment good under the provisions of the bankrupt law, there can be no recovery."

The questions raised by these four points are the questions of law reserved. The verdict of the jury establishes that Philip Hoerr's judgment and execution were fraudulent, as an unlawful preference under the bankrupt law. Now, it is well settled that a security or priority in fraud of the bankrupt act, gained by a suit in a state court, has no better claim to protection than a payment by the debtor himself, and if the property of a bankrupt has been seized and sold under process from a state court, issued on a judgment which is void

as a preference, the assignee may maintain an action against the creditor to recover the proceeds of sale in his hands, or the value of the property. *Showan v. Wherritt*, 7 How. 627; *Clarion Bank v. Jones*, 21 Wall. 325. These cases, it seems to me, authoratively determine that the assignee of Nicholas Wurzell, Sr., was not concluded by the distribution made in the state court.

But it is strenuously argued that as the execution of Lindsay, Sterrett & Co. was confessedly good, and would have taken the fund produced by the sheriff's sale had Hoerr's execution been set aside or excluded, the assignee had no interest in the fund. To sustain this position the defendant relies upon the cases of *Wilcocks v. Waln*, 10 Ser. & Raw. 380; *Manufacturers' & Mechanics' Bank v. Bank of Pa.* 7 Watts & Ser. 335; *Schultz's Appeal*, 1 Barr. 251; and *Tomb's Appeal*, 9 Barr. 61. The principle of these cases is that the last of three or more liens, in the order of their succession, being superior to the first but inferior to the second, gains no practical advantage from its priority, because it could not be preferred to the first without also being preferred to the second, to which it is subsequent. And the argument here is that the assignee could not have taken the fund from Lindsay, Sterrett & Co., because their execution was valid; and as he was not entitled to it as against them, he could not prevent the application of the fund to Hoerr's execution, which was prior to that of Lindsay, Sterrett & Co. In other words, it is claimed that the fund raised by the sheriff's sale belonged to one or the other of these execution creditors, to the exclusion of the assignee.

But, as applicable to the case before us, we cannot accept as sound the defendant's reasoning, or adopt the conclusion to which it leads. It is not now necessary to consider what would have been the proper disposition of the fund realized by the sheriff's sale had the assignee been a claimant in the court of common pleas. He was not bound to go into that court, and, as we have seen, is not concluded by the distribution there made. The case in hand is not a contest for priority between lien creditors. The assignee recovers the money

in the defendant's hands by the assertion of a superior title conferred upon him by the bankrupt law. The defendant is in no better position than if the money had been paid to him directly by the bankrupt in fraud of the law. Therefore, as against the assignee, he cannot retain the money. Moreover, Lindsay, Sterrett & Co., it will be perceived, having taken nothing by their execution, are thrown upon the general assets of the bankrupt, and justice to the general creditors requires that the fund in the defendant's hands—the fruit of an unlawful execution—shall come to the assignee for distribution *pro rata* among the creditors.

Upon the questions of law raised by the defendant's fifth, sixth and seventh points the opinion of the court is with the plaintiff.

The verdict of the jury was for the value of the goods sold by the sheriff. But clearly the defendant's liability does not extend so far. His writ did not authorize the sheriff to sell more of the bankrupt's goods than was necessary to satisfy that execution. In fact the sheriff sold by virtue of three writs of *fi. fa.*, and one of these was unimpeachable. Part of the proceeds of sale went to the second execution creditor, against whom the assignee is prosecuting a suit to recover the money so paid to him. The extent of the defendant's liability is indicated in his fourth point. The sheriff applied to the costs of his writ \$128.45, and to his judgment \$803.46, or in all \$931.91. The plaintiff, therefore, is only entitled to recover in this action the last mentioned sum, with interest from the time of payment to the defendant, March 6, 1876. Upon that basis the true verdict, on May 30, 1879, would have been for the sum of \$1,112.62.

And now, to-wit, February 17, 1880, it is ordered that judgment be entered upon the questions of law, reserved in favor of the plaintiff, for the sum of \$1,112.62, with interest from May 30, 1879, *non obstante verdicto*.

## HOE and others v. COTTRELL and another.

*Circuit Court, D. Connecticut. March 30, 1880.)*

**PATENT—PATENTEE SOLE INVENTOR—BURDEN OF PROOF.**—In a suit for an alleged infringement of letters patent, the burden of proof is on the defendant to show that the patentee was not the sole inventor, although prior thereto foreign letters had been issued to such patentee and another for the same invention.

**COMMISSIONER'S DECISION—FORMAL DEFECTS NOT REVIEWABLE COL-LATERALLY.**—In such suit the commissioner's decision is final that the drawings and the model required by the statute had been presented, that the attorney of the applicant was duly constituted by the applicant, and had authority to amend or alter the specification, and that the specification had been sufficiently sworn to by the inventor.

**COMBINATION—VALID CLAIM.**—A claim is not invalid upon the ground that the several elementary parts of a combination have no conjoint action, and no active connection to produce a joint result, where there was invention in the combination, and the patentee was the first inventor.

**SAME—INVENTION.**—In determining whether there was invention in any particular combination, the important point is to ascertain whether novelty and utility existed

**OMISSION OF CLAIM IN STATEMENT OF INVENTION.**—A patent is not void by reason of the omission of a claim in the statement of the invention in the body of the specification, which had been introduced by way of amendment into the claim, where the combination recited in the claim is shown in the drawings and described in the specification.

*M. B. Phillips and Benjamin F. Thurston, for plaintiffs.*

*H. D. Donnelly and William A. Shipman, for defendants.*

SHIPMAN, J. This is a bill in equity, based upon the alleged infringement of letters patent, which were granted on March 16, 1869, to Richard M. Hoe, as the assignee of Auguste Hippolyte Marinoni, for an improvement in lithographic printing presses. The patent has been assigned to the plaintiffs.

The first question is whether Marinoni was the sole inventor of the alleged improvement, or was a joint inventor with Francis Noel Chandre. In 1866 Mr. Hoe was in France, and purchased from Marinoni all his right to the invention in consequence of the future grant of letters patent therefor in the United States. Marinoni made oath, in his application to

this government for the letters patent, that he believed himself to be the original and first inventor of the improvements, and that they had been patented in France on June 5, 1865, in the name of Marinoni and Chandre.

Chandre, who was a partner of Marinoni at the date of the invention, testified that he was a joint and equal inventor of the improvement which he describes at length. On June 12, 1865, a Belgian patent was issued to Marinoni and Chandre, and an English patent was issued to one Clark, upon their communication. By the French statute every new discovery or invention, in all departments of industry, confers upon its author, under the conditions and for the time mentioned in the statute, the exclusive right of working for his own profit the said invention: "Every person who shall wish to obtain a patent of invention must deposit, under a sealed cover, \* \* \* (1) his petition to the minister of agriculture and commerce; (2) a specification of the discovery, invention or application forming the subject of the petition; (3) the drawings," etc. The patents demanded in due form are delivered without previous examination. Applications are not required to be verified by oath, and are not preserved by the government.

The plaintiffs introduced Marinoni's deposition, in which he asserted that he was the sole inventor. It is necessary for the defendants to overcome the *prima facie* case, and to establish affirmatively that the applicant was not the sole inventor. The testimony of Chandre is not sufficient. I cannot perceive from the depositions that one story is apparently more entitled to confidence than the other. Marinoni's statement is exceedingly brief, and is a bare assertion that he was the inventor. Chandre is equally positive of his joint participation in the invention, and he describes its character; but is equally silent as to the manner in which they worked, and as to the method by which they jointly accomplished the result. If the defendants could have shown an admission by Marinoni, in either foreign application, that he was not the sole inventor, it would have turned the scale, but it is not cer-

tain what the application was, or that he personally made an application.

The French system of issuing patents is not so exact as that which prevails here. While the existence of the foreign patents, confessedly with the knowledge of Marinoni, throws doubt upon his title, and while I am not satisfied as to the authorship, it is impossible to say that the defendants have established, by a preponderance of proof, the fact that Marinoni was not the sole inventor.

It is next insisted that the patent is invalid by reason of sundry irregularities and omissions during and prior to the transit of the application through the patent office. These alleged irregularities are as follows: Marinoni appointed Messrs. "Munn, Wales and Beach" to act as his attorneys in presenting the application, and in making "all such alterations and amendments as may be required, and also to sign his name to the drawings." This authority was never revoked by Marinoni or by Hoe. Hoe & Co., who had no record interest in the invention, revoked the power to Munn & Co., and appointed C. A. Durgin to represent them in the premises. The specification which Marinoni had made and filed was not intelligible. Durgin amended the specification by writing substantially a new one, which was not sworn to by the inventor. It is claimed that there were no original drawings or model accompanying the description, as required by the statute, because the description was unintelligible and was not a description.

All these alleged irregularities and omissions relate to the formal acts to be done by the inventor, or by his duly constituted attorney, preparatory to and connected with the issuing of the patent. The commissioner's decision upon the fact that the acts were done, and upon the fact of the compliance of the applicant with the requirements of the statute in regard to his application, is not to be reviewed collaterally. For the purposes of this case the commissioner's decision is final, that the drawings and the model required by the statute had been presented; that Durgin was the duly constituted attorney of the applicant or his assignee, and had

authority to amend or alter the specification; and that the specification had been sufficiently sworn to by the inventor. If the patent is invalid by reason of any or all of these defects its invalidity is to be determined in a proceeding to set aside the patent by *scire facias*, or by bill, or information. *Seymour v. Osborne*, 11 Wall. 7, 96; *Jackson v. Lawton*, 10 John. 23.

The defendants insist in the third place that, in view of the state of the art, there was an entire lack of invention in the combination which is the subject-matter of the third and only claim which is said to have been infringed, or that the combination was old. The improved press was for lithographic printing. The invention recited in the third claim was for the combination of a sheet flier with an impression cylinder without tapes, and a receiving cylinder provided with grippers and tapes, substantially as described and specified. The object of the invention was to have the whole width or surface of a sheet of paper printed with heavy color on the impression cylinder, and to be delivered automatically, without smutting, face side uppermost on the fly board or table. The whole width of the paper is enabled to be printed, because the impression cylinder is without tapes underlying the sheet. The sheet is taken by the grippers of the receiving cylinder and is delivered upon tapes running from the receiving cylinder over pulleys near the roots of the fly fingers. These tapes are above the fly fingers, and thus prevent the sheet from being smutted in consequence of sliding down the smooth fly frame. When the sheet is in proper position it is automatically turned by the fly frame, face side uppermost, upon the table.

If there was invention in this combination, and the patentee was the first inventor, the claim is not invalid upon the ground that the sheet flyer and impression cylinder have no conjoint action, and no active connection to produce a joint result. The combination is of the class mentioned in *Forbush v. Cook*, 2 Fisher, 668, in which case Judge Curtis says: "To make a valid claim for a combination it is not necessary that the several *elementary parts* of the combination should

act simultaneously. If those elementary parts are so arranged that the successive action of each contributes to produce some one practical result, which result, when attained, is the product of the simultaneous or successive action of all the elementary parts, viewed as an entire whole, a valid claim for thus combining these elementary parts can be made." The result which was attained was the automatic delivery of a sheet, automatically printed upon its broadside with heavy color, without smutting, face side uppermost. This result was the product of the successive action of all the elementary parts.

It is not denied that all the elements were old. Delivery mechanism, consisting of tapes combined with flyers, had been used in presses having printing cylinders with tapes, impression cylinders without tapes, and receiving cylinders with tapes had been combined with sheet flyers without tapes, but the combination of all the elements in one existing machine, was new. It is substantially admitted that this combination had not been actually made or described in any machine, although it is claimed that the combination was so far suggested in antecedent patents that the flyer could have been added by any skilled press builder as a matter of course.

Prior to the date of the invention *sheet* flyers were a common adjunct of a press. They were made so as to be detached from presses, and to be put on or taken off at pleasure. Tape and sheet flyer deliveries had been combined, and, therefore, when Dutartre, in his French patent of January 11, 1853, showed an impression cylinder without tapes, a receiving cylinder with grippers and tapes, and a tape delivery, it is said that any skilled builder could have mechanically added a sheet flyer to the tapes.

It is further said that when the Reynolds American patent of February 27, 1863, contained the same combination, and, after showing how the paper was delivered to the tapes, added, it is "piled by hand or by an ordinary fly," it was the part of ordinary mechanical labor to add the fly to the tapes. It is to be observed that Reynolds did not suggest the combination of fly and tapes. The same point is put by the



defendants more forcibly in this way: The plaintiffs, at the date of the invention, were making in their factory the Hoe high stop press, which had an impression cylinder without tapes, a receiving cylinder with tapes, and a sheet flyer without tapes. They also knew of the Taylor press, and were making at the same time divers presses like the Taylor, having impression cylinders with tapes, and a combined tape and sheet flyer delivery. What was easier than for Mr. Hoe to discard his ingenious sheet flyer, and substitute the well-known Taylor method of delivery? Looking at the question from the present stand-point of time, it is very difficult to point out satisfactorily to one's self the changes which required invention. If he looked merely at the simplicity of the combination, and at the ease with which it now seems that anybody could have accomplished the result, the conclusion would be irresistible that there was no combination.

The facts which are also to be taken into account in the determination of this question are these: At the date of the invention about 1,800 patents upon printing presses had been granted in England, France, and the United States. This combination did not exist in any patented or non-patented device, so far as is now known. Lithographic printing was at the time well understood. Mr. Hoe, who had long been a printing press manufacturer and inventor, and was thoroughly conversant both by study and practice with the subject of improvements in printing, and was making both the Hoe high stop press and presses which had tape and fly deliveries, when he saw the Marinoni press recognized it as an invention embodying an advance in the art, and hastened to purchase the exclusive right to use the improvement in this country. The combination is useful. It has been a successful and popular press, and has been extensively sold. The plaintiffs have substituted it for the Hoe high stop press. The exhaustive and expensive manner in which this suit has been carried on and contested shows that the combination is of value.

In the determination of the question whether there was invention in any particular combination, the important point

is to ascertain whether novelty and utility existed. It is true that these requisites may result from mere mechanical skill, and a new and useful combination may be formed by the mere mechanical addition of an old member to an old set of members. But when a device has a new mode of operation, which accomplishes beneficial results, "courts look with favor upon it," and are not exacting as to the degree of inventive skill which was required to produce the new result. There must be some, but a little will suffice. *Furbresh v. Cook*, 2 Fisher, 668; *Middletown Tool Company v. Judd*, 3 Fisher, 144; *Stimpson v. Woodman*, 10 Wall. 117.

The facts that in the multiplicity of printing press mechanism this combination had not been hit upon, and that when it was introduced its utility was universally recognized, and that it is plain that in order to make the combination some changes were necessary in any machine or drawing which has been shown, satisfy me that to produce this result required changes which the mere skill of the skilled mechanic would not suggest, and that the work was practically more difficult than now seems to the theorist to have been necessary.

The defendants next insist that the patent is void because the patentee, in the body of his specification, states that his invention consisted in the combination with the receiving cylinder, provided with grippers and cords or tapes, of the sheet flyers; whereas, a new element is introduced into the claim, viz.: "an impression cylinder without tapes."

This claim was introduced into the claim by amendment after the application had been rejected, and the corresponding amendment was not made in the statement of the invention in the body of the specification. It is admitted by the defendants' expert to be true, "that the combination recited in the third claim is all shown in the drawings and is described in the specification, as to its principles of construction and mode of operation, but it is equally true that it is nowhere described, except in the claim, as one of the parts of invention of the patentee." It would not be in accordance with the principles of construction which have heretofore been

adopted by the courts of this country to declare the patent void on account of this discrepancy or omission.

In regard to infringement, differences in the construction of the two machines exist, but they are not material with respect to the mode of operation of the combination which is the subject of the third claim.

Let there be a decree for an injunction, and an accounting in respect to the third claim.

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### KIRBY BUNG MANUFACTURING Co. v. WHITE and others.

(Circuit Court, E. D. Missouri. March 17, 1880.)

**PATENT—RESTRAINING ORDER.**—The function of a restraining order is to protect the plaintiff without unnecessarily oppressing or annoying the defendant, and will, therefore, be framed according to the circumstances of each case.

**SAME—DECREE OF COURT—GROUND FOR RESTRAINING ORDER.**—In the case of an infringement the final decree of a court of competent jurisdiction, restraining the validity of a patent, in the absence of collusion, furnishes a sufficient basis for an injunction or some form of a restraining or accounting order.

**SAME—PROOF IN ABSENCE OF DECREE.**—"If there has been no decision as to the patent by a United States court, on the merits, the party is driven to show that his patent went into use undisputed for a sufficient time to raise a *prima facie* case in his favor."

TREAT, J., (*orally*.) The case of Kirby against several defendants is before the court on a motion for a provisional injunction. It is a patent case. It may not be known to counsel, who appear here from another circuit, what the uniform rule is in this circuit as to applications for provisional injunctions. An injunction is the strong arm of equity. It should never be allowed to operate oppressively upon any one, but be used for the purpose of securing the rights of the complainant in the case pending the litigation, without unnecessarily injuring the other party. Were it otherwise, the injury resulting might be very serious. For instance, in the milling cases before us, Mr. Justice Miller allowed the defendants' mills to continue in operation on giving bonds of

\$125,000 or \$150,000, instead of granting an injunction in the first instance, which might have closed all the mills in the north-west. If he had stopped all of the mills by the issuance of an injunction *simpliciter*—it having been finally determined that the complainants' patent was invalid—there would have been a great wrong perpetrated upon the parties defendant. Hence, the rule is this,—and is the true rule in equity, as settled in this court by Justice Catron, and existing up to the present hour, and I am authorized by Judge McCrary to say that he fully concurs,—that the function of a restraining order is to protect the plaintiff without unnecessarily oppressing or annoying the defendant. Whether restraining orders go out in patent cases, or in other cases, they are framed according to the circumstances of each case, to-wit: In one case there may be such circumstances as require an injunction *simpliciter*, but ordinarily a bond and order for accounting suffices, and sometimes simply an order for an accounting. Hence, the form of the order varies with the circumstances. I make these preliminary remarks so that parties may understand that an injunction *simpliciter* is not to be had for the asking. I am very well aware that the practice under the state laws is different, if it now is the same as years ago. Under the state practice there is but one form of a restraining order, to-wit: If an injunction is asked for provisionally, it must issue as an injunction *simpliciter*. This is not the rule in equity, and has never been the rule in the courts of this circuit. The course in these preliminary matters is to protect the complainant without unnecessarily injuring the defendant.

There is a patent presented to the court for a bung-cutting machine. It is a combination patent, and a very commendable patent in itself. The various devices work automatically to effect the desired end. This patent has been before the circuit court of the United States for the district of Indiana, and a decree was ordered by Judge Drummond in favor of the complainant; and not being familiar with the facts of that case we take it for granted—as the law requires—that it was a correct decree, upholding the validity of the patent.

By a reference to the proofs I see that the matter was very fully considered, and the "claims" involved in this suit are said to be valid and subsisting "claims." For the purposes of a provisional injunction under the patent law two things, or either of two things, may exist, to-wit: As in this case, a court, after full consideration of the matter, has rendered a final decree upholding the validity of the patent, that is a sufficient basis in itself for an injunction or some form of a restraining or accounting order, provided the party defendant in the particular case has infringed the patent; in other words, the court, on a motion for a provisional injunction, does not go into the merits to ascertain the validity of the patent. *Prima facie* the patent is valid; but under the uniform rulings of the courts of the United States for more than half a century, if there has been no decision as to the patent by a United States court, on the merits, the party is driven to show that his patent went into use undisputed for a sufficient time to raise a *prima facie* case in his favor. But if the court, after a due consideration of the matter, has reached the conclusion that the patent is valid, on this provisional matter the inquiry is not open.

The United States circuit court, sitting in Indiana, Judge Drummond giving the opinion, decided after a fair contest, for from the record it seems to have been a *bona fide* contest, that this patent is valid. I make the remark "after a fair contest," because sometimes it has been supposed that a mere decree entered *pro forma* on the merits is sufficient in itself to require all other United States circuit courts to grant a provisional injunction. Not so. We have held in this circuit that it must have been an honest and not a collusive matter. In a case in the United States circuit court of Alabama a matter formerly arose which illustrates my remark.

When one of the most distinguished lawyers of New York was before me, he cited a case which was decided in California, and which, on an examination of the record, I found to be a sham case, the decree being obtained by collusion in order to allow parties who held the patents to put under restraint parties refusing to submit to their demands; and, of course,

I considered it of no force. Just so in the Alabama case. It was another one of collusion. Perhaps there has been a more remarkable illustration arising out of the milling cases, concerning what are known as the "new process" patents. An alleged collusive case arising as to these patents went to the supreme court.

When one of these matters is presented to the judges of the circuit court they are bound to see whether it was a "consent" or collusive decree, in order to form a basis on which the party obtaining it might go through the country levying tribute. Such is not this case. This is an honest case—has been fully considered, and everything connected with it appears to be a fair and honest contention. In making these remarks I make them in a general way. Here is a case which has been decided after a full and fair contest by parties struggling for their respective interests in the matter.

We come now to a consideration of what the patent is. As already stated the matter in controversy here is as to one of a number of devices to effect a particular end. It is a little remarkable that in this case there is no disclaimer. Ordinarily, after the specifications set out the condition of the art, etc., it disclaims certain things. This patent does not. The patentee divides his claims into five parts. It is alleged that the fourth claim is infringed. Without a model of the drawings those who listen to me could hardly understand the claims of the patent. We find that the principal object was this: that inasmuch as the old cutting board, which constantly became frayed or chipped when a fish-mouth chisel was used, and great difficulty and trouble occurred, Mr. Kirby invented an automatic contrivance by which through (or over) the fish-mouth chisel there would be conveyed little square blocks, the diameter of which would be the diameter of the bung desired, with a slide pushing over the mouth of the chisel one block on top of another. But the chisel being fish-mouthed of course it would be passed into the upper block a short distance; and that block thus answers the ordinary purposes of a cutting board, sliding another on top of that, so that it continued successively to utilize each block and give

the bung desired without the loss of any material. He had a very ingenious arrangement for that, and it operated with the whole machine, automatically. But that involved a cone, eccentrics, various bars, slats, slides, etc., which it would take too much time to explain, unless I had the model before me.

The patentees' claim is described by himself as follows:

"1. The chisel or cutter D, with cylindrical cavity, in combination with the plunger C, and feeding bar *i*, constructed and arranged, substantially as described, for the purpose of cutting bung blanks from separate square blocks of wood.

"2. The combination of feeding slide-bar *i*, feed-box C, guides *oo*, and spring *o'*, for feeding successively one of a series or pile of bung-blocks forward in exact line with the cutting edge of the chisel of a bung machine, operating substantially as described.

"3. The cutter D, feeding slide-bar *i*, and plunger C, so arranged relatively to each other as that the cutter or chisel shall, when cutting, have at least two blocks or blanks in line with its cutting edge, and that at each stroke of the machine the cutter shall finish cutting one block or blank, and enter and partly cut a second blank, instead of cutting a single blank at each stroke, substantially as and for the purpose hereinbefore described.

"4. The cutter and feeding device of a bung-cutting machine, arranged substantially as hereinbefore described, as that each block as it is fed into the machine shall serve as a cutting board for the next preceding block.

"5. The use of the hinged bar *m*, in the slot of the sliding feed bar *i*, in combination with the vibrating shaft *h'*, whereby, by raising the bar *m*, the motion of the feed bar *i* is suddenly arrested, without stopping the motion of the other parts of the machine."

The fourth claim is the one which it is alleged the defendant infringes. Now, if the combination for placing one block after another on the fish-mouth cutter, whether underneath or sideways, vertical or longitudinal, so as to operate as a cutting board through which that fish-mouth may penetrate,

is an infringement of this patent, the complainant would be correct. But it is not so. It is a particular way of doing a particular thing. It is a mechanical device wrought out by combinations, which combinations are not in defendant's machine.

To support this motion the complainant, Mr. Kirby, gives a general affidavit, which on examination amounts practically to nothing more than his verification of the original bill. On the other hand, we have a description given of what the defendant's operations are. They are not produced by plaintiff's combination of mechanical devices. The consequence is that the motion must be denied. But it is proper to remark, in this connection, that it is desirable that on these motions for preliminary injunction the court should give no elaborate opinions because the merits are not fairly before it; and this case illustrates it. We have the opinion of the complainant in the bill that the defendant has infringed his patent, but what does that amount to? He ought to give us what the defendant is doing. It is not for him to assume the functions of the court and swear that his case is as he has averred. He should give the facts to the court and let it determine on those facts whether there is an infringement or not. On the other hand, we have from the defendant a description of what he is doing, illustrated by drawings.

In this imperfect state of the case, without passing upon the merits, the court decides that there is nothing before it at this stage of the case to show an infringement. That is all the court decides this morning.

The motion for a provisional injunction is denied.

McCRARY, J., concurred.



**QUIROLO v. ARDITO and another.**

(*Circuit Court, S. D. New York.* January 20, 1880.)

**PATENT—WANT OF NOVELTY—BILL DISMISSED WITHOUT REGARD TO ANSWER.**—In a suit for an infringement, the bill will be dismissed, without regard to the answer, where the patent is void on its face for want of novelty.

**Infringement of Patent.**

**WHEELER, J.** This suit is brought for relief against an infringement of re-issued letters patent No. 6,557, dated July 27, 1875, granted to the orator for an improvement in stereoscopes, consisting of a combination of legs, with the standard for the stereoscopes to stand upon. The answer denies the novelty of the invention. It is not very clear upon the evidence whether stereoscopes were made to stand upon legs before they were so made by the orator; but, whether they had been or not, such stands had long been in use for surveyor's compasses, theodolites, cameras, telescopes, and other mathematical and optical instruments, as is well and generally known. Stereoscopes had been placed upon stands for a long time.

This part of the patented invention does not relate to the stereoscopes themselves at all, but only to the mode of mounting them. There could be no invention in putting a stereoscope upon one kind of well known stands instead of another. It was merely putting the old stand to a new use. So, whether the invention was known or used or described in the exact manner, or by the persons, set up in the answer, or not, the patent, in this respect, which is the only one in controversy, is void on its face for want of novelty, within common knowledge, which is sufficient for dismissing the bill without regard to the answer. *Brown v. Piper*, 91 U. S. 537; *Terhune v. Phillips*, 99 U. S. 592.

Let a decree be entered dismissing the bill of complaint, with costs.

## MALONY v. CITY OF MILWAUKEE, etc.

*(District Court, S. D. New York. April 3, 1880.)*

**ADMIRALTY JURISDICTION — MARITIME TORT ON CANAL — “NAVIGABLE WATER OF THE UNITED STATES.”**—An alleged maritime tort, committed upon an artificial water-way or canal opened by a state for the purposes of commerce, is within the admiralty jurisdiction of the United States courts, where such water-way is in fact used as a highway of commerce between the states of the Union and between foreign countries.

Libel to recover damages caused by a collision.

*E. D. McCarthy*, for libellant.

*F. A. Wilcox*, for claimants.

CHOATE, J. This is a libel to recover damages caused by a collision between the libellant's canal boat Oliver C. Gibson and the steam canal boat City of Syracuse, while the latter was in tow of the steam canal boat City of Milwaukee, which was proceeding under steam and towing the City of Syracuse on a hawser of about 100 feet in length. The collision happened on the evening of November 2, 1877. The place of the collision was in the Erie canal, about 100 miles east of Buffalo, in the county of Munroe, and state of New York. The canal boats City of Milwaukee and City of Syracuse were attached by the marshal of this district, on the process issued in this case, in a place called the New Jersey central basin, within the limits of Jersey City. This basin communicates with the bay of New York through the Morris canal basin, and the place of seizure was about half a mile from what is now the open bay, and at a point about 500 feet southerly of the original shore line at high-water mark, and about 150 feet westerly from the westerly side of Henderson street, which is at that place an artificial structure built out into the bay upon the flats. Thirty years ago this basin in which the boats were seized was part of the bay of New York, and admitted to be below the ordinary high-water line on the Jersey shore.

Two defences are made by way of exception, as well as by answer, which it is necessary to dispose of before considering the merits of the case: (1) that the subject-matter of the suit

is not within the admiralty jurisdiction of the United States, the place of collision being upon a canal or artificial water-way over which that jurisdiction does not extend; and (2) that the place where the canal boats were seized by the marshal is without the limits of the southern district of New York.

1. The first question is one of very great importance to the commercial interest of the country. It has never been expressly decided by the supreme court of the United States, but the weight of authority is in favor of the jurisdiction. In the case of the *The Monitor* the district court for the eastern district of New York entertained jurisdiction of a case of collision upon the Delaware & Raritan canal, which, like the Erie canal, is an artificial water-way over the land, but communicating between what are admitted to be navigable waters of the United States.

Upon an application to the supreme court for a writ of prohibition that court refused the writ. It is understood, however, that the eight justices who heard the case were equally divided in opinion, and no written opinions were delivered. The point arose, and was expressly ruled in favor of the jurisdiction by Judge Emmons, in the case of *The Avon*, 1 Brown's Adm. Rep. 170. It is also understood that the jurisdiction is entertained by several of the district courts. The point is somewhat discussed in the case of *The E. D. McChesney*, 8 Ben. 150, by Judge Blatchford, but the case before him did not call for a determination of the question. Without going at large into a discussion of the reasons for and against the jurisdiction, it is enough for the disposition of the point in this case to say that, upon a careful perusal of the opinions delivered by the supreme court which touch upon the question, it seems to me that the test established for determining the jurisdiction in admiralty, in a case of alleged maritime tort not on tide-water, is whether the place in which it was committed is upon the "navigable waters of the United States," and that an artificial water-way or canal opened by a state to public use, for purposes of commerce, and while in fact used as a highway of commerce between

the states of the Union, and between foreign countries and the United States, is "navigable water of the United States" within the meaning of that term as used to define and limit the jurisdiction of the admiralty courts. Nor, as it seems to me, is there any force in the suggestion that this proposition trenches upon the rightful power and jurisdiction of the state through whose territory and by whose law, in force for the time being, the canal is so opened and used, because the exercise of this jurisdiction does not in any way in itself impair or affect the right of the state (whatever that right may be) to withdraw or terminate that dedication of its property to the public uses of commerce.

At any rate, considering the present state of authority and practice in the courts inferior to the supreme court, I do not feel at liberty to decline the jurisdiction. The question is one of national importance, and must, doubtless, soon receive full consideration and a final determination in the supreme court. *The Genessee Chief*, 12 How. 443; *The Hine*, 4 Wall. 555; *The Eagle*, 8 Wall. 15; *The Daniel Ball*, 10 Was. 557; *Ins. Co. v. Dunham*, 11 Wall. 1; *The Montello*, 11 Wall. 411; *The Lottawanna*, 21 Wall. 558.

2. In respect to the second objection it is claimed, on the part of the libellant, that the convention between the states of New York and New Jersey, in the year 1833, which was consented to by the United States, with some qualifications, (Revised Statutes, § 541,) has enlarged the limits of this district, so that it now extends to high water mark on the New Jersey shore, instead of being limited to the low water mark, as it is admitted to have been prior to 1833.

This claim, however, was very fully considered and determined in the negative by Judge Blatchford, in the case of *The L. W. Eaton*, in this court, (decision January 26, 1878, unreported.)

The only question, therefore, is whether, at the time of their seizure by the marshal, these canal boats were above or below low water mark. The evidence on that point is somewhat conflicting, and there is no doubt that in exceptionally low tides, and particularly when a strong north-west wind has

kept the tides down, the water all runs out of this basin and leaves the flats bare where these boats lay; but the preponderance of the proof is that ordinary low water mark is within less than 150 feet from the westerly side of Henderson street, at the part of the basin where the boats lay, and that they were below low water mark at the time they were seized. This exception must therefore be overruled.

3. The merits are clearly with the libellant. The libellant's boat was coming east; the two steam canal boats were going west. The night was dark and rainy. The wind was blowing a violent gale; so violent that shortly before this collision the two steam canal boats were windbound on the berme bank of the canal, towards which side the wind blew. Before that they had been proceeding with the City of Syracuse ahead, pushed by the City of Milwaukee. The wind was so strong that this method of proceeding was abandoned as impracticable, and the City of Milwaukee took the City of Syracuse on a hawser of about 100 feet in length, and towed her in that way till the collision. The collision happened about 200 to 300 feet west of the "wide water" or "ox-bow," near Freeport. Before the two steam canal boats got out of the "wide water" they saw the light of the Gibson ahead, in the canal. Her light indicated that she was a horse-boat and the lights of the other boats indicated that they were steamboats. The rules, as understood by both parties, required the steamboats to take the berme bank side, and the horse-boat the tow-path side of the canal. The distance at which the Gibson's light was made appears, by the evidence of the master and wheelsman of the City of Milwaukee, to have been from 300 to 500 feet.

The allegation of the answer is that when the light was made the two steamboats were proceeding in the middle of the canal. The proofs show that they were not, properly speaking, in the canal, but still in the wide water, approaching and very near to the canal. But the proofs and the answer both show that, in order to get into their proper place in the canal for passing the Gibson safely, it was necessary for the steamboats to haul further towards the berme bank, which,

as they were going, was to port or the left hand; and it is clear that the City of Milwaukee starboarded in order to get into that situation. They all kept on without slackening speed. Meanwhile the Gibson, if before she had been in the middle of the canal, had hauled over to the tow-path side. The Gibson and the City of Milwaukee passed each other safely, but very close, the evidence being that they rubbed together, at one point at least. The allegation of the libel is that the two steamboats did not keep their own side, but crowded the Gibson against the tow-path side, and, after the City of Milwaukee passed, the City of Syracuse, being still on the tow-path side and badly steered, ran against the bow of the Gibson on the starboard side, breaking her in so that she immediately sunk.

The allegation of the answer is that as the Gibson passed by the stern of the City of Milwaukee she took a sudden sheer from the tow-path side towards the berme bank side, and thus threw herself in the way of the City of Syracuse, which was properly proceeding well over on the berme bank side.

The testimony is that the steersman of the Gibson was alarmed before the bow of the City of Milwaukee came up to his bow, by the way she was coming, threatening to run into him. His alarm was so great at the situation that he shouted out to the people on the boat, who were below at supper, that a boat was running into them and they would be sunk. That the City of Milwaukee was in his way and had not yet hauled safely over to her own side of the canal, appears also clearly from the testimony of her master and wheelsman that, from the time they saw the light, they kept a starboard wheel till her bow lapped the Gibson 40 feet, when it became necessary to throw her wheel the other way in order that her stern might clear the stern of the Gibson.

It is clear from this that the City of Milwaukee, towing the City of Syracuse after her on a hawser, was crossing from the middle of the canal, or from further towards the tow-path side, over towards the berme bank, on an angle. If, as is clear, while in this position, the City of Milwaukee was obliged

to throw her stern towards the berme bank to clear the Gibson, then the City of Syracuse, if she was stretched out straight behind the City of Milwaukee, as the master and wheelsman of the City of Milwaukee say she was, was further out than the stern of the City of Milwaukee towards the tow-path side, and in very great danger of coming in collision with her, since at that time those two boats were only 100 feet apart, and approaching at a combined rate of three and a half miles an hour. These facts show conclusively that the City of Milwaukee did not turn out soon enough to enable the City of Syracuse to clear the Gibson and fix the liability for the collision on the two steamboats, which were under one command, unless the Gibson is shown to have contributed to the disaster by encroaching on the other boats, or by sheering out after passing the City of Milwaukee, as alleged in the answer. But the evidence is, I think, very satisfactory that the Gibson was on the tow-path side when she was struck.

The City of Syracuse is a very sharp boat, and her stern struck and broke into the bow of the Gibson about two feet from her stern, on the starboard side, breaking two of the heavy iron wales, and her planking and timbers, causing her to sink within a very short time. The blow was nearly head on, and I see no force in the argument, upon the proofs in the case, that the blow pushed the bow of the Gibson in any closer than she was before to the tow-path. It is clear that if the City of Syracuse had been going straight along on the berme bank side, as is claimed for her, and the Gibson quartering towards that side as is also claimed, and so far over as to be struck where she was, her bow would not be thrown by the blow towards the tow-path, nor would she have sunk, as the proof is that she did sink, with her bow aground, close by that side. To those on the two steamboats proceeding at an angle towards the berme bank, as is above shown, the Gibson may have seemed to be sheering out upon their course, although in fact she was going straight, and this explains the contradiction in the testimony on that point.

Great stress has been laid by the claimants upon the fact testified to by some of their witnesses that in pulling out the

bridge from the Gibson, to save the horses which were on board, the shore end of the bridge rested in the water on the sloping wall below the tow-path. This, it is claimed, shows that the Gibson was too far out into the canal. The argument has little force, for want of certainty in the elements of the calculation. The length of the bridge, and the distance from the wall to water deep enough to float the Gibson, are only given according to the estimates of witnesses, and not from actual measurements. The possible variation or error in these elements leaves the place still undetermined, and to be fixed by other proof. The libellant's witnesses deny the fact that the bridge rested in the water, but quite likely they have forgotten the circumstance; and it is probable that some of the claimants' witnesses have exaggerated it when they place the end of the bridge two feet under water, and make the horses climb or jump a steep wall of stone some six feet above the bridge. But, however this may be, the evidence is wholly indecisive as proof of the Gibson having sheered out. Such a sheer, under the circumstances, would be in the highest degree improbable and fool-hardy—a running into danger with one's eyes open. Upon the whole evidence it is clear that this allegation of a sheer on her part must be held not proved.

In reaching this conclusion I have given very little weight to the testimony of the steersman of the City of Syracuse, who was a witness for the libellant, and who testifies that it was impossible, on account of the wind and defects in the rudder of that boat, to keep her headed towards the berme bank at all as she approached the Gibson. This witness is shown to have made contradictory statements on that point out of court, and on several other points he is so seriously contradicted that I should be unwilling to find any fact on his unsupported testimony.

On the question how the City of Syracuse headed with reference to the course of the City of Milwaukee, the master and steersman of the latter boat, as above stated, thought she followed nearly straight. The libellant's witnesses testify that she did not follow straight, but headed more towards the



tow-path side. They corroborate the wheelsman of the City of Syracuse on this point, describing her as steering wildly, heading towards the tow-path.

It is not at all improbable that, with such a violent wind and the boat only half loaded, as she was, and having a very sharp bow, she should yaw and dive somewhat, even if the witnesses from the City of Milwaukee are right that in the main she followed well.

The position and nature of the blow tend strongly to indicate that at the moment of the collision she was headed more towards the tow-path side, or, at any rate, less towards the other side than the City of Milwaukee—in fact, on a dive, as the witnesses call it, in the direction of the Gibson; and there is nothing in the case to make this so improbable as to warrant the inference that, from the position of the blow, and the relative positions of the two steamboats, the Gibson was then out of her proper place.

I have given little importance to alleged admissions on either side after the accident. There is evidence that the libellant, in conversation, said the other boats were not to blame, and that the master of the City of Milwaukee said it was unavoidable; but, besides this evidence being contradicted, such circumstances are of no importance where the facts are so plainly proved as in this case.

The libellant was insured, and has apparently no interest in the suit. Being insured he was less likely to complain of the other party, and in talking of the character of the weather and the furious wind he may well have said something that the witnesses understood to mean that he did not blame the other boats. Such evidence is generally worthless, and of no weight, considering the great uncertainty and inexactness in the report of conversations years after they take place.

The cause of the collision was the carelessness of those in charge of the claimants' boats in not sheering out in time and keeping out of the way of the Gibson; in not proceeding so slowly and carefully that they could do so after coming in sight of her.

The furious wind made the navigation particularly dangerous, especially with the City of Syracuse on a hawser.

Decree for libellant, with costs, and reference to compute damages.

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O'ROURKE v. TWO HUNDRED AND TWENTY-ONE TONS OF COAL.

(District Court, S. D. New York. April 5, 1880.)

CONSIGNEE OF ENTIRE CARGO—PLACE OF DISCHARGE—INACCESSIBLE AND HAZARDOUS WHARF.—The consignee of an entire cargo has no right to designate, as the place of discharge within the port, a wharf which is unreasonably inconvenient, inaccessible, or extra hazardous to the vessel.

PRIVATE WHARF.—A private wharf is a proper place to discharge a cargo, where it can be used by strangers upon the payment of compensation.

TENDER—REFUSAL TO RECEIVE CARGO.—A refusal to receive cargo after due notice, and after the lapse of a reasonable time given the consignee to accept, dispenses with the necessity of a formal tender.

BILL OF LADING—EVIDENCE.—Evidence of prior conversations is inadmissible to vary the provisions of a bill of lading.

In Admiralty.

*E. D. McCarthy,*

*R. P. Lee,* for claimants.

CHOATE, J. The libellant was the owner and master of the canal boat Mary O'Rourke. On the twelfth day of December, 1877, he received on board of his canal boat 221 tons of coal, shipped by the firm of A. Pardee & Co., at Perth Amboy, N. J., and signed and delivered a bill of lading therefor, acknowledging the shipment of the coal in good order and condition, and promising to deliver the same in like good order and condition "at the port of Hackensack, (the dangers of the sea only excepted,) unto J. H. T. Banta, or to his assigns, he or they paying freight at the rate of 2½ cents per ton along-side; captain tending guy."

The same day the libellant's boat, with the coal on board, was towed up the Hackensack river and moored along side of a pier or dock on the west side of the river, a short distance below what is called the "village bridge." In that im mediate

vicinity, below the bridge, are three or more piers or docks, to which it is customary for steam tugs coming up the river to bring canal boats. The libellant having arrived at this place reported his arrival to the consignee, Mr. Banta. The consignee directed the libellant to bring his boat up to his (the consignee's) wharf to discharge, and offered to send him two men to help him pole his boat up to that wharf, which was situated within what is known as the port of Hackensack, about a mile further up the river.

The libellant denied the consignee's right to require him to do this, claiming that he had come as far as his contract required him to bring his boat, but offered to go up if the consignee would insure his boat, which the consignee refused to do. The parties, having come to no adjustment of the difference between them, then agreed to meet the next day at the office of the shippers of the coal in New York. They met there but never came to any agreement, and after remaining at the wharf in Hackensack, where the tug left him, several days, and after notifying the consignor that he must take the coal away if the consignee did not receive it, the libellant had his boat towed down the river and brought the coal to Gowanus basin, Brooklyn; and while the cargo was there he libelled it for breach of the contract contained in the bill of lading.

The question is whether the libellant had performed his agreement by bringing the boat alongside this wharf below the bridge and offering the coal to the consignee there. If he had done all that the bill of lading required it is clear that he can maintain this suit for damages. The claimants, however, insist that he was obliged to go to the consignee's wharf, if the consignee required it, as in fact he did.

I think the rule of law is that where the vessel is chartered, or the shipment is of the entire cargo to one consignee, by bill of lading, and no place of discharge within the port is named in the contract, the charterer or consignee has the right to designate the place of discharge within the port, provided that the place so designated is a usual and proper place. *The Boston*, 1 Lowell, 464; *The E. H. Fittler*, Id. 114; *Davis v*

*Wallace*, 3 Cl. 130; *Sleeper v. Puig*, Dist. Ct. S. Dist. N. Y. unreported; S. C. affirmed, 8 Reporter, 357.

I think these cases recognize as a qualification of this right of this consignee to designate the place of discharge that it must be one not unreasonably inconvenient or inaccessible, or extra hazardous to the vessel. Whether or not it is so inconvenient, inaccessible, or extra hazardous, must be determined by the circumstances of the particular case.

In the present case there were certainly some inconveniences and some hazards to the libellant's boat in complying with the consignee's request to take her to his wharf to discharge her cargo. At the wharf at which she stopped she could lie safely at all stages of the tide and discharge her cargo continuously. At the consignee's wharf she could lie and discharge at high tide, but when the tide was about two-thirds down, on account of the want of depth of water, she would have to be shoved out into the river or hauled away till the tide rose again sufficiently for her to be brought back to continue her discharge. The bottom was such that it would be unsafe for a loaded boat to lie there aground. The time required for the discharge of her cargo would thereby be prolonged certainly one day, and perhaps two. To reach the consignee's wharf the libellant's boat, which drew 6 feet and 10 inches, could only cross the bar in the river above the bridge when the tide was at least half flood, and there was no practicable way of getting her up there except by poling her up on the flood-tide. Nor would it be safe to do this in the night-time. There was but one time in the day, of about three hours, when it could be safely attempted. It was late in the season, and that time of year, December 12, ice was liable to form in the river any night, and at the consignee's wharf, which was a mere bulk-head, lying along the bank of the river, the boat would, in case of ice forming while she was detained there, be in danger of being cut and sunk by the ice, and in danger of being frozen in.

The delay that would be necessarily caused by the only method of discharge practicable there, as above described, might very possibly lead to the loss of libellant's boat from this

cause. The place was not a safe one for the boat to winter. I think this necessary detention in discharging was, under the particular circumstances of the case, and considering the season of the year, not only a serious inconvenience to the vessel, but that it made that place extra hazardous. No doubt the vessel takes upon herself the usual perils of the port, and if she agrees to carry to a port, and there is not in the port any place of discharge at which she can safely lie for a continuous discharge of her cargo, she must submit to this inconvenience as being within the contract, but subject to all delays of this character necessarily incident to the port as a port. I doubt very much whether a vessel can be directed by the consignee to a place of discharge at which she cannot discharge continuously, if there are any places within the port, usually resorted to for the discharge of such cargoes, and where she can discharge her cargo, which are not open to this objection. Judge Lowell thus states the rule in the case of *The Boston*, 1 Lowell:

"In the absence of evidence of usage, I lay down the rule of law that when there are two or more wharves in the port, *equally convenient to the carrier*, he is bound to deliver at that most convenient to the shipper, if he be duly and seasonably notified of such preference."

In general, a vessel cannot be required to lie idle unless it is necessary. A continuous delivery of cargo after arrival, if practicable, is to be presumed to have been contemplated by the parties. But, however it be may in a case where this is the only inconvenience, it seems to me clear that where this necessary detention involves the vessel in a danger of loss or injury, beyond what mere delay usually does, a place subject to this objection is neither reasonably convenient nor safe within this rule of law. The poling of libellant's boat up the river to the consignee's wharf would also be a considerable inconvenience.

I am not able to find on the evidence that it would be attended by any greater danger than ordinary navigation, if the men attempting it were accustomed to the work. The consignee offered the services of his men, to be paid by libellant.

He did not offer to have her poled up at his own expense. It is unnecessary to determine the point made on the part of the libellant that this inconvenience alone, and the fact that it would require libellant to put his boat in the power of strangers, would have excused him from going to the consignee's wharf. But, under all the circumstances, I hold that the place designated was not such a proper place as the consignee has the right to designate.

It is urged, however, that the wharf at which the boat lay, and all the wharves below the bridge, were private wharves, and that the consignee had no right to go there to receive the cargo; but he testified himself that he offered to discharge there if the libellant would pay the cartage to his dock. This shows that it was a wharf which parties other than the proprietor of the wharf could use for a compensation. This made it so far a public wharf as to be a proper place to discharge.

It is also insisted that the libellant did not tender the cargo there. There may have been no formal tender, but it is evident, from the consignee's own testimony, that the libellant gave him to understand distinctly that he had arrived with his cargo at a place which he considered the end of his voyage. The only point made between the parties was whether he must, under his contract, go to the consignee's wharf, as the consignee claimed he should do. The consignee distinctly refused to receive the cargo where the boat lay, and, after waiting several days, the libellant took it away.

No other tender was necessary. Nor was the libellant bound to wait there any longer. He had the right to take his boat out of the river, where it was not safe for him to remain with her longer at that season of the year. The libellant appears to have been unduly alarmed at the risks of going up the river, and to have insisted that his boat could not safely be carried up, and to have overestimated the inconvenience and danger probably attending her lying at the consignee's wharf and discharging there; but these circumstances are immaterial.

The real question is whether, under the circumstances, his

contract required him to go further. The rights of the parties are fixed by the bill of lading, and the evidence of conversations prior to the date of it cannot have any effect to vary its provisions. The facts that the consignee's wharf was an old wharf, and that many canal boats were towed or poled up there every year, and that the consignee generally received his coal there, have no bearing on the question. His wharf was not the customary place for landing cargoes of coal at the port of Hackensack. It was, at most, but one of several such customary places; and the particular contracts made in other cases are not shown. This libellant had the right to stand on his contract, even if other persons had yielded to the demand of this consignee, under similar contracts, to bring their boats to his wharf; and the consignee could have expressly contracted to have the boat brought to his wharf if he had seen fit.

The libellant is entitled to a decree for the damages sustained by him from the refusal of the consignee to receive the cargo.

Decree for libellant, with costs, and a reference to compute damages.

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BERGEN v. THE STEAM-TUG JOSEPH STICKNEY, ETC.

(*District Court, S. D. New York. March 15, 1880.*)

**COLLISION—EVIDENCE—BURDEN OF PROOF.**—"In the case of injury from a collision the burden of proof is upon the libellant to show, by a fair preponderance of the evidence, that the collision happened, and that it was the cause of the injury."

In Admiralty.

*J. A. Hyland*, for libellant.

*E. D. McCarthy*, for claimant.

CHOATE, J. This is a libel for damages alleged to have been caused by a collision between the steam-tug Joseph Stickney and the libellant's canal boat, *Ida*, on the twentieth day of May, 1879. The *Ida* was taken in tow on the nineteenth of May, having on board a cargo of coal, at South Amboy,

and, with several other boats, brought to a place in the East river called the Sea Fence, where it was usual to stop with tows preparatory to distributing the boats according to their several destinations. The libel charges that while the *Ida* was lying moored by the sea fence, the tug, in taking up other boats for distribution, and having on her port side two boats, ran against the *Ida*; that the outside boat on the port hand of the tug struck the *Ida* on her port quarter about six or eight feet from the stern with great force, causing the injuries alleged to have been sustained. To maintain his case the libellant himself and his son, about 12 years old, testified. The libellant swore that the boats came together with so great force as to split a thick and heavy fender; that no apparent damage was done to the side of his boat, and that he did not know at the time that any damage was done, but the tug with the boats in tow continued to press and crowd the *Ida* forward so that she was pushed forward six or eight feet and her bowline parted. He says that he did not discover the damage done till his little boy opened one of the hatches and told him that the water was running in. He was then going below for his pipe, and he went and looked and saw that she was sinking; that he then called out to the captain of the tug that he was sinking.

On the part of the tug the pilot was examined. He admits that in getting other boats along-side the tug for the purpose of taking them away he lay close to the *Ida*, but he denies having hit her, or crowded her against the pier. Another witness called on the part of the tug stood on the pier and saw the whole performance. He saw no collision, nor any crowding of the *Ida* forward. The boy testified to his father's putting in the fender between the *Ida* and the other boat. He also testified to the other boat striking the *Ida*, but says nothing of the nature or force of the blow, or of its splitting the fender, or of the crowding of the boat forward, or parting the bowline. The supposed injury to the boat was the squeezing of her sides together so as to burst off two planks on the stern, and otherwise to strain her so as to make her leak



badly and sink in 10 or 15 minutes. It is a fact that she sunk soon after the libellant discovered that the water was running in. It was shown that she was 12 or 13 years old and very weak—so much so that the libellant yielded to the advice given him by the pilot of the tug not to have her towed to her destination at the foot of Fifty-third street, East river, on the inside of two other loaded boats, lest she should not bear the pressure, although the day was fair and the water smooth. The libellant had at first insisted on being taken away with these other boats, and had been put along-side the tug, and inside of two boats, where it was proper to put her, because she was the last boat to be delivered; but upon the remonstrance of the pilot that she could not stand the voyage, she had, with the consent of the libellant, been put back again along-side the pier shortly before the alleged collision.

The burden of proof is upon the libellant to show by a fair preponderance of the evidence that the collision happened and that it was the cause of the injury. I do not think the evidence is sufficient. He is himself the only witness to the collision, except his young son, who really corroborates his story very slightly as to there being a collision, and by his not confirming his father's account upon several other points he really weakens the force of the libellant's whole testimony. It is also hardly credible that, if there was so serious a blow and pressure as he testifies to, and particularly if it burst out the stern, he should not have noticed the effect of it at once.

The proved condition of the boat was such that her springing a sudden leak and sinking from the effect of ordinary usage and without apparent cause would have been nothing surprising, and the slight jarring caused by moving her about and putting her back to the pier is quite as likely to have caused the leak as any effect which resulted from what is proved to have been done by the tug and tow after she was put back along-side the pier.

While the libellant is made by the law a competent witness, he is an interested party, and as his story is not corroborated, and is in itself scarcely credible, and is contradicted by two

witnesses, I should not be justified in receiving it as sufficient proof of the fact charged.

The fact of collision is not made out, nor is it shown that the sinking was caused by anything done by the tug after the *Ida* was put back along-side of the pier.

Libel dismissed, with costs.

### UNNEVEHR v. THE STEAMSHIP HINDOO, etc.

(District Court, S. D. New York. February 12, 1880.)

COMMON CARRIER—BILL OF LADING—LIMITATION OF LIABILITY—NEGLIGENCE—LOCKWOOD v. R. Co. 17 WALL. 357.—Where a common carrier has been guilty of negligence, he cannot avail himself of a provision in a bill of lading limiting his liability to £100.\*

SAME—CONSIGNEE—NOTICE OF TIME AND PLACE VESSEL WOULD DISCHARGE CARGO.—The mere fact that the libellant's agent knew of the arrival of the ship does not dispense with the necessity of actual notice of the time and place the vessel would discharge her cargo.

SAME—NEGLIGENCE—GOODS ON PIER AWAITING TRANSFER TO PUBLIC WAREHOUSE.—A ship is liable *in rem* where goods are stolen through negligence, while still in the custody of the owners of the ship, after being discharged on a pier, and waiting to be conveyed to the public warehouse by the public carman.

In Admiralty.

*E. Root*, for libellant.

*W. R. Beebe*, for claimants.

CHOATE, J. This is a libel to recover the value of a box of merchandise shipped at Hull, England, under bill of lading, and to be delivered in New York. The steamship arrived on Sunday, the fourth of June, 1877. There were eight boxes shipped and consigned to the libellant. They were discharged upon the steamship's pier, in Hoboken, in the forenoon of Tuesday, the sixth of June, and remained on the pier when it was closed at night. During the night one box was stolen from the pier by river thieves, and it is for this box that the suit is brought. Several defences have been attempted.

1. It is claimed that the libellant has been guilty of fraud

\*See *ante*, 382.

in respect to the contents and value of the box in making a claim in this suit which he knew to be far beyond its real value. He claims that the case was worth \$8,000, the contents being chiefly valuable photographic negatives, books and pictures, with household goods, bedding, etc. A great deal of evidence has been taken bearing upon this issue. The libellant has sworn to the contents of the box, and he is corroborated to a considerable extent by other testimony.

In respect to the value of the negatives, which constitute the chief part in value, it appears that the libellant had sold out to one Cooper the models from which the negatives were taken, and had, by his agreement with Cooper, disintitiled himself to make profitable use of at least some of the negatives in this country. The proper valuation of the negatives, considering the agreement with Cooper, may be very difficult to ascertain, but I am not satisfied that the valuation put upon them by the libellant is so extravagant and purposely so exaggerated as to make the present claim fraudulent.

The circumstances chiefly relied on by the claimants as sustaining this defence seem to me of very little weight, and, upon the whole testimony I think they have failed to establish the fraud set up in the answer.

2. Another defence is that by the bill of lading the limitation of liability is fixed at £100. It is enough to say that this limitation is no answer if negligence be proved. *Lockwood v. R. Co.* 17 Wall. 357.

3. Unreasonable delay of the consignee, after notice by public advertisement of the time and place of discharge, according to the alleged custom of the port, is also relied upon as a defence. The point made is that after a reasonable time was afforded to the consignee to take away his goods upon their being unladen, the liability of the ship *in rem* ceased; that even if there was negligence afterwards, for which the ship-owners might be responsible in a new relation of warehousemen, the ship is not so liable. And it is insisted that the consignee should have come for his goods during the day, Tuesday, and that his delay beyond 5 o'clock on that day was unreasonable, and discharged the ship from all liability.

The general principle is well settled that the consignee, on receiving notice of the time and place of discharge, must attend and take his goods within a reasonable time. *Price v. Powell*, 3 N. Y. 322; *Sprague v. West*, Abb. Adm. 552; *The Santee*, 2 Ben. 523; *The Prince Albert*, 5 Ben. 386; *The Kathleen Mary*, 8 Ben. 169. But there are several reasons why this defence is not available to this ship in the present case. No actual notice of the time and place of discharge was given to the libellant. The claimants rely on a constructive notice, by publication in the *Journal of Commerce*, and have attempted to show a custom or usage within which they seek to bring this case. The evidence, if it establishes any usage in this respect, shows that the custom of steamship companies is to give a notice of three or four days. In this case only one day's notice was proved. The evidence as to the usage is also conflicting.

The fact that the libellant's agent in New York knew of the arrival of the ship does not dispense with notice of the time she would discharge. These eight cases were, in the absence of an invoice, passed through the custom-house by the libellant's agent on Monday, the fifth day of June, upon an application for an appraisement, in such a way that it was necessary for them to go to the appraiser's store. Accordingly, they were not to be received by the consignee, from the ship, like goods for which a permit was obtained. They were to go to the public store, and to be taken there by the cartmen employed by the custom-house authorities. And the proof is that the claimants land on their pier goods which are to go to the public store; that while on the pier they pass the custom-house officer stationed there for the purpose, among other things, of passing such goods and of seeing that they do go to the public store; and when they are taken by the public store carman the ship takes the carman's receipt for them on the ship's cargo delivery book.

The proof is that the custom-house officials merely exercise such supervision over goods, discharged as is necessary to prevent their being taken away without a permit; or, if they be not permitted goods, by any other person than the public

store carman. The custom-house does not assume any such possession or custody of the goods while on the pier as relieves the ship from their safe-keeping till they are delivered in due course of business to the public store carman. The pier was in the exclusive occupation of the claimants, and the gates at the head of the pier were locked by them at night. Custom-house inspectors remained on the pier during the night. In the present case the necessary order authorizing the custom-house inspector to have these eight cases sent to the public store was not received by them at the pier in season for them to be carted away on Tuesday afternoon, and in fact the goods did not pass the inspectors and receive their mark showing their destination that day. This was done as to the seven cases that remained the next morning.

Whether this delay was unusual in the routine of custom-house business, or if so who was chargeable with fault in this delay, is not shown. Nor does it appear that the libellant could have done anything to prevent the delay in carting the goods to the public store. Nor if he had gone to the pier could he have taken the goods away. Under these circumstances, it is clear that he is not chargeable with any unreasonable neglect to receive the goods. The course of business on the part of the claimants as to goods destined for the public store was shown to be such that there was no delivery of them until their delivery to the public carman. See the *St. Laurent*, 7 Ben. 7; *The Ville de Paris*, 3 Ben. 276; *Carnana v. Packet Co.* 6 Ben. 517.

4. It is also insisted that the claimants used proper diligence in the watching of the goods during the night. The pier was about 700 feet long, and was covered by a close shed, in which there were left five openings, two on one side, and three on the other. The interior of the shed was well lighted with gas. These goods were lying nearly opposite one of the openings, and about 200 feet from the gate at the inner end of the pier. The pier is open underneath, so that small boats can pass through from side to side.

Claimants employed one watchman, who, about half past 1 o'clock, heard a noise at the lower end of the pier. Before

that time he had been near the upper end of the pier. On hearing this noise he went to the lower end of the pier and remained there, on the outside and on the inside of the shed, an hour or more. Meanwhile the libellant's box was taken away by river thieves. Comment seems unnecessary. It was a clear case of negligence.

Decree for libellant, with costs, and a reference to compute damages.

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**FARR and others v. THE BRITISH STEAMSHIP FARNLEY.**

*(District Court, D. Maryland. March 30, 1880.)*

**COLLISION—STEAMER AND VESSEL—BURDEN OF PROOF.**—In case of a collision between a steamer and sailing vessel, the steamer is held in fault unless it can be shown that she was prevented from performing her duty by some fault on the part of the sailing vessel.

**SAME—IMPENDING DISASTER—DUTY OF MASTER.**—Where the collision was impending through the fault of the steamer, the master of the sailing vessel is only required to act with reasonable skill and judgment.

In Admiralty.

*Brown & Smith*, for libellants.

*Thomas & Thomas*, for claimant.

MORRIS, J. Collision between the schooner A. R. Weeks and the steamship Farnley.

The libel alleges that the schooner A. R. Weeks, 445 tons, laden with coal, sailed from Baltimore for Boston on the eighth of September, 1879, and was proceeding down the Chesapeake bay with a seven-knot breeze from the north-west, her course being S. by E.  $\frac{1}{2}$  E., and on her starboard tack, with all her proper lights burning, when, at 7:30 P. M., the lookout noticed a mast-head light, distant nearly five miles, and soon after discovered a green light; that those in charge of the schooner continued to watch the mast-head and green light until the hull of the steamship could be seen; that when the lights were first seen they bore about one point on the schooner's starboard bow; that the schooner continued her course until the vessels were about a cable length apart,

the steamer continuing still on the schooner's starboard bow, when suddenly the steamer showed her port light, and came squarely across the course of the schooner; that the schooner had continued to hold her course during all the time, but when it was discovered that a collision was unavoidable the master of the schooner ordered her helm to starboard, in the hope of easing the force of the blow; but the starboard bow of the schooner struck the port side of the steamship, forward of the bridge, and the schooner was so injured that she filled with water and sank within an hour.

The answer of the claimants of the steamer alleges that she was proceeding up the bay at four miles an hour, using but one of her boilers, the other being disabled, but with speed sufficient to make her respond to her helm; that her regulation lights were properly placed and burning, a Chesapeake bay pilot on her main bridge, her mate on the skeleton bridge, and a lookout on the bow, when, a little after 7 P. M., the pilot and mate saw, with the aid of a glass, the sails of the schooner, four or five miles off, a *quarter of a point* on the steamer's port bow; that at 7:20 P. M. the pilot and mate saw, and the lookout reported, the red light of the schooner three-quarters of a point over the steamer's port bow, between three and four miles off; that the helm of the steamer was ported, *and in few seconds put hard a-port*, causing the steamer to fall off more than three points to the starboard; that the vessels continued to approach until within less than a quarter of a mile apart, the schooner being then between three and four points on the steamer's port bow, and her red light only visible, when she suddenly starboarded her helm and turned her head directly across the track of the steamer, exhibited only her green light, and ran into the steamer; that the speed of the schooner was from seven to eight miles an hour, and that of the steamer four, so that their combined speed was between 11 and 12 miles, and that after the schooner changed her course there was not time to check the speed of the steamer, but her best plan was to try to pass before they should come together.

The libellants produced the master of the schooner, whose

watch it was, and who was on deck at the time of the collision; the second mate, who was at the wheel; and the lookout, who was stationed in the schooner's bow. Their testimony supports the allegations of the libel, and all say that until just prior to the collision they continued to see the green light of the steamer over the schooner's starboard bow, and that the schooner held her course.

The master says that when the steamer showed her red light she was from 300 to 400 yards off, and that she then turned nearly at right angles to the schooner's course; that when he gave the order to put the schooner's helm hard starboard, the steamer's bow was nearly up to the line of the schooner's course, and she was from only 150 to 200 feet off.

The lookout says he kept the green light in sight until he saw the hull of the steamer looming up, then he saw her swing around very fast, and saw her broadside almost as soon as he saw her red light; that when he heard the master sing out to the man at the wheel, the schooner's bow was pointing to about the fore rigging of the steamer, and he was then sure a collision could not be avoided. The wheelsman testifies that when the lookout reported the green light he saw it, and that it bore about a point over the starboard bow, and that he also saw the red light when reported, and that, when the captain ordered the wheel to starboard, the steamer was 100 to 150 feet off, and her bow just crossing the line of the schooner's course.

The first mate and steward of the schooner, who were brought on deck by the hallooing, corroborated these statements, so far as they had opportunity of witnessing the occurrences.

This is the case for the libellants. The law having put upon the steamer the duty and responsibility of keeping out of the way and avoiding collision with a sail vessel, when a collision does occur the steamer is held in fault unless she can show that she was prevented from performing her duty by some fault on the part of the sailing vessel.

Let us see whether the claimants of the steamer have succeeded in showing this. The pilot in charge of the steamer



says he made out the schooner's sails with the aid of a glass from the main bridge, *directly ahead*, and about three-fourths of an hour afterwards saw her red light one and one-half points on the steamer's port bow; that he was steering by the Polar star, and the steamer's course was N.  $\frac{1}{2}$  W. and he says the schooner's proper course down the bay from her then position was S. by W. He says that if the vessels had continued the courses they were then on they would have passed port to port *a mile apart*; that when they got within a mile of each other, not fearing a collision, but from extra caution, he ordered the steamer's helm to port and continued under a port helm until the schooner was several points on his port bow, and about abreast of him, and about a quarter of a mile off, when, seeing both the lights of the schooner, he ordered his helm *hard a-port* and ran half a mile under the *hard a-port* helm, having run about two miles in all from the time he first put his helm to port up to the time of the collision, and having gone off in all seven and one-half points from his original course; that is to say, half a point only less than a right angle.

The first mate of the steamer was on the skeleton bridge, and his testimony as to the intervals between the orders to port and to *hard a-port* the steamer's helm is somewhat different. He says he saw the schooner first four or five miles off, nearly ahead, and then saw her red light three-fourths of a point on the steamer's port bow; that he called to the pilot, who said, "It is all right, she is showing us her red light, and is on our port bow;" that the vessels continued to show red to red until five minutes before the collision; then the helm was ported, *and when the steamer had gone her length the pilot ordered it hard a-port*; that the steamer was going under the *hard a-port* helm when he saw the schooner's green light, and the collision occurred shortly after.

The wheelsman of the steamer also says he saw the schooner's red light; that his attention was called to it by the lookout singing out "A light on our port bow;" that the order was *then* given to him to port, and *immediately after hard a-port*; that the steamer fell off from N. by E. to E.  $\frac{1}{4}$  N.,

i. e., about seven points in all. Afterwards, he says, he saw the schooner's red and green lights, and then she struck the steamer. The lookout of the steamer was not produced as a witness.

It is by this explanation of the occurrences preceding the collision, contained in the testimony of the pilot, the mate and the wheelsman, that the claimants of the steamer seek to show that the disaster was altogether brought about by the fault of the schooner; but to my mind the account they give of the movements of the two vessels, and the causes of the collision, is incomprehensible and incredible. The schooner was on her course down the bay; she had the wind fair, and not the slightest reason, so far as can be seen, to change her course. And these witnesses would have the court believe that when the vessels were a mile apart they were red to red, and in such positions that if each had continued her course they would have passed from 200 yards to a mile apart; that out of superabundant caution, when he first saw the red light, about a mile off, the pilot ordered the steamer's helm to port, and afterwards *hard a-port*, and that the steamer ran two miles, describing nearly a quadrant, and therefore necessarily greatly increasing the distance at which they must pass each other. Yet these witnesses insist that somehow or other the schooner, without changing her course, got within a quarter of a mile of the steamer; that she then starboarded her helm, and, pursuing the steamer, ran into her. Not only, as it seems to me, are these alleged movements of the schooner unaccountable, but it is hardly less incomprehensible why, if, as these witnesses testify, the vessels were about to pass at such safe and increasing distances, the steamer should, before any change was observed in the schooner's course, put her helm to port, and, as some of the witnesses say, and as the answer avers, immediately afterwards *hard a-port*, so that she turned nearly a right angle to her former direction. If, however, the fact was that those on the steamer mistook the course of the schooner, and supposed it to be west of south, as the pilot and mate of the steamer both say they thought it was, instead of S. by E.  $\frac{1}{2}$  E.

as those on board the schooner say it was, and as their proper course, by the chart, should have been, and they supposed, until they got close to her, that she was going off the *westward*, when she was really going to the *eastward*, then all the maneuvers of the steamer and the consequent collision are accounted for. Or, if it be the fact, as seems possible, that those navigating the steamer did not see the schooner at all until just before the collision, but must have been observing another vessel, then the collision is accounted for. But no theory advanced by the claimants is, to my mind, sustained by the weight of testimony, or free from startling improbabilities.

The claimants rely, with some confidence, upon the testimony of Harper, the chief engineer of the steamer, to prove that the schooner must have been on the port side of the steamer. He says he looked out from the engine-room door, on the steamer's port side, and saw the schooner's red light, and it is manifest that he could not, from his position, see any object on the steamer's starboard side. He says: "I saw this red light for about half a minute, then saw both her red and green lights, and shortly after that the collision took place." It is, therefore, quite possible that when he looked out and saw the red light it was because the steamer had so far crossed the line of the schooner's course as to bring the schooner's red light where he could see it.

Nor does the testimony of the steward prove the claimant's defence. He was some 200 feet from the bow—the steamer being 280 feet long—and not, in a position favorable for observation. In his examination in chief he says: "I looked over the port rail and I saw a red light one-half to three-quarters of a point on our port bow, and from three-quarters to a mile off. Our ship was falling off to starboard under a port helm, and I continued to observe this light until she was just ahead of us, about 200 yards off, and then the next I saw she was coming right into us." He afterwards qualified his statement, and says he does not know whether or not the helm was ported or not when he first saw the red light, but he says he did notice, after he saw the red light,

that the steamer's head was falling off, but he does not explain how it was that he continued to see the schooner's light *right ahead* of the steamer until just before she came into them.

All the witnesses on both vessels agree that the schooner maintained her course until just prior to the collision, when she put her helm hard starboard, and went off to the eastward.

In my view of the case, it now only remains to be considered whether this starboarding her helm was a fault on the part of the schooner. Those on board of her testify that when this order was executed the collision was unavoidable; and her master says that he thought then, and still thinks, that if she had continued her course she would have struck the steamer a more direct blow, and would have sunk both vessels, and that it was a proper maneuver to lessen the force of the blow. I am inclined to think from the evidence that this was probably a mistake, and that if the schooner had ported her helm she might have passed under the steamer's stern; but this mistake of judgment—if, indeed, it was a mistake—is not, I think to be visited upon the schooner. It was the steamer which had brought about the peril, and all that could then be required of those in command of the schooner was to act with reasonable skill and judgment, in the face of an impending and unexpected disaster, and I do not think it has been shown that the master of the schooner did not so act. *The Lucille*, 15 Wall. 679; *The Carroll*, 8 Wall. 302; *The Western Metropolis*, 6 Blatch. 210; *Leavitt v. Jewett*, 11 Blatch. 419; *The City of Paris*, 9 Wall. 638; *The Falcon*, 19 Wall. 75.

I find the steamship to be solely to blame for this collision, and pronounce in favor of the libellants.

**CRAWFORD and others v. MELLOR & RITTENHOUSE.**

(*District Court, E. D. Pennsylvania. April 7, 1880.*)

**LIBEL—DELAY IN UNLOADING VESSEL—LIABILITY OF OWNER OF CARGO FOR DETENTION OF VESSEL.**—The owner of a cargo, who delays unloading it after the vessel arrives at the designated wharf, is liable to the owners of the vessel for damages for its detention, although by the terms of his purchase of the cargo the vessel was employed and the freight paid by the shipper.

A. purchased coal from B., to be delivered at a certain wharf. B. employed a vessel to transport the coal. When the vessel arrived at the wharf the master handed the bill of lading for the coal to A.'s agent, but the latter delayed unloading for five days. *Held*, that A. was liable to the owners of the vessel for its detention.

**In Admiralty.**

Libel by the master and owners of a barge against the consignees of a cargo to recover damages for detention of the vessel. An answer was filed and testimony taken, which disclosed the following facts: Respondents, who were manufacturers in Philadelphia, purchased of Bright, Thomas & Co., of that city, 1,200 tons of coal, to be delivered by the vendors "along-side Kersey's wharf," on the Schuylkill river, at \$1.75 per ton. At the same time respondents made a contract with Kersey, the owner of the wharf, to unload and store the coal and deliver it at their manufactory. Bright, Thomas & Co., in carrying out their contract, shipped, on libellants' barge, 204 tons of coal, which, by the terms of the bill of lading, were to be transported to Kersey's wharf and delivered to respondents. The bill of lading contained no stipulation for demurrage. Libellants' vessel arrived at Kersey's wharf, and the master immediately handed the bill of lading to the superintendent employed by Kersey, but, owing to the fact that there were seven boats at the wharf ahead of libellants' boat, the latter was detained five days before the superintendent commenced to unload the cargo. The master testified: "We lay outside the wharf, two abreast, and I took my turn with the other boats." After the cargo was discharged the master received back the bill of lading, with an indorsement that the coal had been unloaded, and subsequently he was paid the freight by Bright, Thomas & Co. This libel was

then filed to recover from respondents \$32 damages for the detention of the vessel.

*John A. Toomey*, for libellants.

The delivery of the bill of lading to respondents' agents was a delivery of the cargo, and created a privity between these parties. *The Schooner Mary Ann Guest*, Olcott, 498; *Griffiths v. Ingledew*, 6 S. & R. 429; *Conrad v. Ins. Co.* 1 Pet. 446; *King v. Meredith*, 2 Camp. 639.

Where the consignee is owner of the cargo he is liable for the detention in unloading. *R. Co. v. Northam*, 2 Benedict, 1; *Robbins v. Welsh*, 9 Phila. R. 409.

*James S. Williams*, for respondents.

The consignees had no interest in this cargo until it came "along-side" the wharf. The delivery of the bill of lading to the respondents' agents, who were authorized merely to "unload, store and deliver" the coal, could in no way affect their rights under the contract of purchase.

Even if the consignees were the owners of the cargo they are not liable here, because they were not the freighters. *Sprague v. West*, 1 Abb. Adm. Rep. 548; *Donaldson v. McDowell*, 1 Holmes, 290; *Jesson v. Solley*, 4 Taunt. 52.

Further, they are not liable, because the detention was merely owing to the crowded state of the dock, and in no manner their fault. *Clendaniel v. Tuckerman*, 17 Barb. 191; *Cross v. Beard*, 26 N. Y. 85; *Trans. Co. v. Hawley*, 1 Daly, 333; *Rodgers v. Forrester*, 2 Camp. 483; *Dobson v. Droop*, 1 Moody & Malkin, 443.

BUTLER, J. From the time the bill of lading was received by the respondents' agent, at least, they were owners of the coal. They could, thereafter, have transferred it to whom they pleased, and if the libellants had carried it away they could have sustained an action for its value. It was kept near the wharf in pursuance of their order, and they are justly responsible for the use of the vessel during the time it was thus detained. If not satisfied to be so responsible they should have designated another place, when this was found to be occupied.

The difficulty respecting privity between the parties, dis-

appears when the ownership of the coal is traced to the respondents. The law implies a contract from the relations of the parties growing out of the transaction. *Robbins v. Welsh*, 9 Phila. R. 409; *Griffiths v. Ingledew*, 6 S. & R. 429; *R. Co. v. Northham*, 2 Benedict's R. 1. The case is readily distinguishable from an ordinary claim for demurrage where the obligation of the vessel is to carry to a particular port, leaving to it the selection of a place to unload.

A decree must be entered for the libellants.

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**BUSSEY v. EXCELSIOR MANFG. CO.**

(*Circuit Court, E. D. Missouri.* February 5, 1880.)

**PATENT—INFRINGEMENT—DAMAGES—EVIDENCE.**—A rescinded contract in relation to the payment of royalty for the use of a patent is not competent evidence in determining the measure of damages for the infringement of the same.

Exceptions of complainant to report of master as to assessment of damages.

*Sprague & Hunt*, for complainant.

*Samuel S. Boyd*, for respondent.

**TREAT, J., (orally.)** Complainant relied for the measure of damages upon a rescinded contract, wherein the respondent agreed that if all or any of the several patents named therein were used by the respondent, one dollar royalty for each stove manufactured should be paid. There was no other evidence offered before the master. Now, as said contract had no longer existence, and the court held that but two of the several patents were infringed, it became necessary to ascertain, in some intelligent manner, the damages sustained by the complainant for the use thereof. No evidence on that subject was offered, and thereupon the master reported nominal damages. The contention is that he should have gone back to the rescinded contract, and applied the terms thereof to the condition of affairs after such contract ceased to be obligatory. The court holds otherwise. The exceptions are overruled, the report confirmed, and costs divided as heretofore ordered.

## LAVIN v. THE EMIGRANT INDUSTRIAL SAVINGS BANK.

*(Circuit Court, S. D. New York. April 1, 1880.)*

**PAYMENT TO ADMINISTRATOR—LETTERS ISSUED DURING ABSENCE OF CREDITOR FROM STATE — “DUE PROCESS OF LAW” — ESTOPPEL.** Payment to a foreign administrator upon the presentation of ancillary letters duly issued by a surrogate upon the proof of the original letters issued under a statute of the foreign state, providing that “if any person shall be absent from this state for the term of three years, without due proof of his being alive, administration may be granted upon such person’s estate as if he were dead,” will not avail as a defence to the subsequent demand of the creditor.

*E. D. McCarthy*, for plaintiff.

*J. E. Devlin*, for defendant.

CHOATE, J. In this case a jury trial has been waived. The plaintiff, an alien, sues to recover the sum of \$400 deposited by him with the defendant, an incorporated savings bank doing business in New York city, with the accumulated interest. The answer admits the deposit by one John Lavin of \$300 on the eighteenth day of July, 1865, and of \$100 on the thirteenth day of January, 1866. It sets up as a defence that on the fourteenth day of February, 1877, one John M. Brennan made application to the surrogate of the city and county of New York for letters of administration upon the estate of the said John Lavin, and that thereupon the said surrogate decided upon such application that the said John Lavin was deceased and had died intestate, leaving assets within said city and county, and thereupon appointed John M. Brennan administrator, and issued to the said John M. Brennan letters of administration of the goods, etc., whereof the said Lavin died possessed in the state of New York; that thereafter, and while said decision of the surrogate was in full force and unreversed, said Brennan presented his said letters to the defendant and demanded, as administrator of John Lavin, the said amount deposited, with accrued interest, and the defendant thereupon paid the same to him.

The answer denies that it was the plaintiff who made these deposits, but his identity was fully established by the evi



dence, and the only question to be determined is that raised by the fact of payment of the deposit to Brennan.

Upon the trial the following facts appeared: The plaintiff was born in Ireland, and came to this country about the year 1859, and soon thereafter he became domiciled at the town of Cranston, Rhode Island, where he remained till after he made these deposits, except that he was temporarily absent for about two years, while in the service of the government, at Hilton Head. After making these deposits he returned to Cranston and remained there about a year, when he went to California. He left in charge of a friend in Cranston a trunk containing some personal effects, including his savings bank pass-book. When he went away he expressed the intention of returning in five years. In California he married, and lived with his wife and children for a number of years, and in April, 1879, he returned to Rhode Island, where he was living when this action was commenced.

After he left for California, and until his return to Rhode Island, in 1879, he had no communication whatever with any person in Rhode Island or elsewhere in the eastern states, or in New York, and no one in any of these states, so far as appears, was aware during all this time of his whereabouts, or whether he was alive or dead. By the laws of Rhode Island it is enacted that "if any person shall be absent from this state for the term of three years, without due proof of his being alive, administration may be granted upon such person's estate as if he were dead." The same statute also provides that in case such person returns into the state the administrator shall account with and pay over to him any assets remaining in his hands, and also account for what he has disposed of under his trust. Under this statute application was made in 1877, after the plaintiff had been absent about 10 years, to the court of probate of the town of Cranston, county of Providence, and state of Rhode Island, for letters of administration upon the real and personal estate of the plaintiff.

Letters of administration were accordingly issued, bearing date the twenty-fifth day of January, 1877, to John M. Bren-

nan, in the following form: "You having been appointed by this court administrator on the real and personal estate of John Lavin, absent from the state without due proof of his being alive, late of the town of Cranston, and having given bond as the law directs, are hereby authorized and empowered to receive, recover and take possession of all and whatsoever real and personal estate which to the said John Lavin doth appertain and belong, and the same fully to administer according to law. Witnesses, etc." On the fourteenth of February, 1877, John M. Brennan applied to the surrogate of New York for ancillary letters of administration. Upon this application he presented his Rhode Island letters, duly authenticated, and also his own affidavit, "that to the best of deponent's information and belief the said John Lavin is dead."

The petition of John M. Brennan to the surrogate states that "your petitioner is a resident of Providence, etc., and is the administrator duly appointed by the probate court of the town of Cranston, county of Providence, Rhode Island, of the personal estate of the said John Lavin, deceased, etc." Upon this petition, and the affidavit and the Rhode Island letters, the surrogate of New York issued ancillary letters of administration, which are addressed to "John M. Brennan, etc., administrator duly appointed by the probate court of the town of Cranston, etc., of the personal estate of John Lavin, deceased;" and the letters recite that the said John Lavin is dead. Under the authority of these letters Brennan collected the money of the bank as stated in the answer.

The statute of Rhode Island permits and provides for administration on the estate of persons who leave the state and remain absent for three years. This is all that is required to be shown under the statute, before the issuing of the letters. This is all that is recited in the Rhode Island letters. They do not purport, on their face, to be letters of administration on the estate of a deceased person.

The first question to be considered is whether payment to Brennan bars the plaintiff's claim, on the ground that Brennan held the letters of administration issued by the surrogate of New York. In the case of *Roderigas v. East River Savings*

*Institution*, 63 N. Y. 460, the court of appeals held that under the statutes of this state the surrogate has jurisdiction and is authorized to issue letters of administration in two cases: *First*, when the person whose estate is to be administered is dead; and, *second*, when the surrogate judicially determines that the party is dead, although, in fact, he is alive. Consequently a payment by a debtor of the supposed decedent, made in good faith, to a person to whom letters of administration had been granted by the surrogate, was held to bar the claim of the administratrix, duly appointed after the death of the party.

This decision, which was by a divided court, three of the seven judges dissenting, is based on the peculiar language of the statutes of New York, which indicated, as held by the majority of the court, an intention that, in favor of innocent third persons dealing in good faith with the person holding such letters, the decision of the surrogate upon the fact of death should be deemed conclusive as against the supposed decedent; and although the operation of the rule is admitted to work a hardship on the supposed decedent, by distributing his property while he is alive among his creditors and next of kin, yet the legislation is defended as proper, and within the principle that the legislature may protect innocent persons from loss or injury when acting in reliance upon acts of public officers, and decrees of courts proceeding with apparent authority and jurisdiction; and, as bearing on the propriety of such protective laws, the suggestion is also made that, by the voluntary and unexplained absence of the party supposed to be dead, he has by his own acts induced the decision made by the surrogate that he was dead.

In a subsequent decision in the same case (unreported) the same court held, however, that to sustain the letters of administration, where the party was alive, there must be produced to the surrogate some competent evidence of the party's death, and the surrogate must himself pass on the question judicially; and, therefore, as it appeared in that case that there was no competent proof of death produced, and that the surrogate had not himself passed judicially on the ques-

tion of death, the defence of payment to the person holding such letters was overruled. The evidence of death produced in that case was the averment of the death, in the petition for the letters, upon the best of the petitioner's knowledge, information and belief; and it was found as a fact by the trial court that the surrogate never saw the petitioner, nor acted upon her petition, nor issued the letters, but that they were issued by his clerk, who used for that purpose a form signed by the surrogate in blank, which the clerk filled out and to which he affixed the seal.

In the present case the evidence offered in proof of death was the petition for letters and the affidavit of the petitioner and the Rhode Island letters. The affidavit of the petitioner is clearly subject to the objection held good by the court of appeals in their decision last above referred to. It neither states as a fact, within the knowledge of the affiant, that John Lavin was dead, nor does it state any facts from which an inference could be drawn that he was dead. It merely states, as did the petition in the case cited, that he was dead to the best of the deponent's information and belief. The Rhode Island papers contained no averment of death, but only of his absence from the state of Rhode Island, and in no way can the granting of such letters in Rhode Island be held by any implication to involve the finding of the fact of death, because the statute authorizes and expressly provides for the issuing of letters on the estate of living persons absent from the state, and these letters, on inspection, appear to have been issued only on evidence of such absence.

The petition in the present case, however, appears to be unlike the petition in the second case of Roderigas. The petition avers positively, and without qualification, the death of Lavin; and the verification by the petitioner is "that the matters of fact therein stated are true, and that the matters therein stated, of my information and belief, I believe to be true." There are certain matters averred as upon information and belief in the petition, but this particular fact of the death of Lavin is not so averred. It is stated as a fact, and therefore that averment is positively sworn to as true in the verification.

I am not able to say, therefore, that there was not some evidence of the death before the surrogate. It is true that, in an affidavit sworn to the same day with the petition, the petitioner stated that Lavin was dead "to the best of deponent's information and belief." While the making of this affidavit was calculated to raise a doubt whether the positive averment in the petition was not a mistake, yet the two averments are not absolutely inconsistent. It is possible that he had actual knowledge of the death as averred in the petition. It would not, on that account, be an untrue or false statement that "to the best of his information and belief," also, Lavin was dead.

The effect of the affidavit as evidence is a matter merely of the sufficiency of the proof. It may have weakened, but did not destroy, the other evidence. Notwithstanding the affidavit, there still remained some competent evidence of death, and if the surrogate held it sufficient proof of the fact his decision cannot be attacked collaterally on the ground that there was error in weighing the evidence.

The present case also differs from that of Roderigas, in respect to the proof of the surrogate having acted judicially on the petition. In that case the fact was found that the surrogate did not act at all. Here the proof is that the papers were submitted to the administration clerk; that the case being an unusual one he submitted them to Mr. Minor, the chief clerk of the surrogate, who returned them with the indorsement, "Issue letters—C. M."

Here the proof stops. It is contended by the defendant that as there is no evidence that the surrogate did not pass on the question, and as the letters are signed by him, and bear the seal of the court, the presumption is that he did his duty, and that the letters were legally and properly issued, and the seal affixed by his authority. The plaintiff, on the other hand, contends that the action of the surrogate in passing on the question of death being essential to the validity of the letters—a prerequisite to his jurisdiction and power to issue them—the burden is on the defendant, who sets up the fact, to prove that such decision was made by the surrogate.

There is no question of the general rule of law that where

an act is justified or a title made under the official act or decree of an officer or court of special and limited jurisdiction, the burden is on the party setting up such title, or justifying such act, to prove that the officer or court had jurisdiction. There must be evidence of those facts, the existence of which are essential to the exercise of the power or jurisdiction. This rule is recognized by statute in the state of New York. Code of Civ. Proc. § 532. It is, however, independently of all statute, a well settled rule of evidence, of general application.

But no well considered case has gone so far as to hold that where a record is produced, made up and authenticated in the accustomed and proper manner, which on its face recites and declares the action which the officer or court has taken upon the matter in question, such record is not *prima facie* evidence that such action has in fact been taken, even although such action is essential to the validity of the proceeding of the court, or the officer under which title or justification is attempted to be made. On the contrary the presumption is always that the proceedings and acts of a court or public officer, apparently done in the discharge of his or its official duty, are regular and lawful, until the contrary is shown. To this extent this presumption does not go so far as to supply, without proof, facts not appearing by the record essential to the jurisdiction, but it certainly extends to those facts recited in the record as the action taken by the court or officer, and which it was a part of its or his official duty, either by statute or well settled practice, to make a part of his record. So far as the record shows, on its face, that he acted, his action, in the absence of evidence to the contrary, is presumed to be lawful rather than unlawful. It is obvious that any other rule than this would, in practice, lead to great insecurity in respect to all titles or proceedings based upon the action of courts and officers of limited and special jurisdiction.

In this case the letters issued by the surrogate of New York are such a record, purporting to show the action of the surrogate. They are signed by him and sealed with the seal of his office, and are in the accustomed and proper form.

They declare, by way of recital and as a fact to which he attests, that John Lavin lately departed this life. This, it seems to me, is, on well settled principles, *prima facie* evidence that the surrogate determined and found judicially that John Lavin was dead. The precise question here is not of the burden of proof as to this essential fact of a decision by the surrogate, but of the sufficiency of the evidence offered to sustain that burden, which is undoubtedly on the defendant, and I think the evidence is *prima facie* sufficient.

*Roderigas v. Savings Institution* (second decision) is an authority that this recital in the record as to the action of the surrogate, and this *prima facie* proof of his personal action, to be presumed from his signature and official seal, can be shown to be false; that it may be proved in contradiction of this record that the surrogate did not sign it, as he appears on its face to have done, and that what he signed was in fact a blank piece of paper; that he did not authorize the seal to be affixed, as he appears to have done; that he did not in fact receive and pass upon the petition, and the testimony adduced in support of it, as by the record he appears, and is presumed, in the due and proper exercise of his official duty, to have done.

All this was shown in impeachment of the record in the case cited, and this proof defeated and showed to be null and void the apparently regular record. But such is not this case. Nothing is shown in this case inconsistent with the surrogate having passed judicially on the petition, with his having signed the letters, after he had so judicially determined, and with his having personally authorized them to be sealed and issued. It is proved that the administration clerk did not take the responsibility of issuing them. He handed the papers to the chief clerk, and they came back with the indorsement, "Issue letters," signed with the chief clerk's initials.

There was nothing in this to show that they were not submitted to the surrogate, and passed on and signed by him, as they appear to have been. It was his official duty to receive and act on them, and by the record it appears that he did so. The fact that the chief clerk put his initials to

the indorsement does not tend to show that he did not. The chief clerk was a proper officer to receive and note his instructions. It certainly cannot be held that this evidence is sufficient, if, indeed, it has any competency, to overthrow the record. Both the chief clerk and the surrogate would have been competent witnesses for the plaintiff, and they were the only persons, apparently, who knew the fact, if the fact was otherwise than appears by the record. Neither of them was called. There is no statute of New York referred to which requires, nor is the point made against these letters, that the petitioner or witnesses should be produced in person before the surrogate, or examined *viva voce*, or that the proof of the essential facts may not be made to his satisfaction by affidavit.

It must therefore be held that this case is not brought within the second decision of the case of *Roderigas v. Savings Institution*, and that the surrogate passed upon the question of the death of John Lavin upon competent evidence; that the letters were issued by him; and that in these respects, and if there is no other fatal objection, the case is within the first decision by the court of appeals, which held the finding of the fact of death conclusive as against the alleged intestate, at least as a protection to an innocent party acting in good faith in reliance upon the letters.

It is urged, however, that the decision referred to should not be followed by this court; that it is not supported by authority or reason; that the court was almost equally divided, and that in the second decision the authority of the first decision is questioned and greatly impaired. The fact that the decision was made by a divided court does not make the decision any the less authoritative, if the point considered was deliberately determined by the court.

In all cases that fall within the thirty-fourth section of the judiciary act, (Rev. St. § 721,) which makes the statutes of the several states rules of decision in the courts of the United States in all actions at common law, the decision of the highest judicial court of the state on the construction of the state statute is followed by the courts of the United States. Thus,



in *Leffinwell v. Warren*, 2 Bl. 603, the supreme court says: "The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."

In *Shelby v. Gay*, 11 Wheat, 367, that court says: "Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this admission may, at times, involve us in seeming inconsistencies, as where states have adopted the same statutes and their courts differ in their construction; yet that course is necessarily indicated by the duty imposed on us to administer as between certain individuals the laws of the respective states according to the best lights we possess of what those laws are."

In *Green v. Neal's Lessees*, 6 Pet. 299, the same court says: "The inquiry is, what is the settled law of the state at the time the decision is made? This constitutes the rule of property within the state, by which the rights of litigant parties must be determined. As the federal tribunals profess to be governed by this rule they can never act inconsistently by enforcing it. If they change their decision it is because the rule on which that decision was founded has been changed." This rule seems to admit of no exception unless where, in case of a change of a judicial construction by the state court, a contract legal according to the decision of the highest court of the state, when it was made, will be invalidated by following the later decision. In such a case, as respects such a contract, such a change in the law is held to be a violation of the obligation of a contract by the state, and is within the inhibition of the constitution of the United States. *Gelpke v. City of Dubuque*, 1 Wall. 206.

Subject to this exception, which has no application to the

present case, this court must follow the decision of the court of appeals in the same way in which any other court in the state of New York must do so, and the question of the propriety of the decision is not open. If that court should see fit to re-open the question and reverse its decision, the federal courts will be bound to accept and to follow its newly declared views of the construction of the statute. The fact that the court were divided shows that the point was doubtful before it was decided, but after it was decided by a majority of voices the decision became the law of the state for all other courts. In the subsequent decision the court of appeals explained their former decision, and distinguished the case before them from it; but, although evidently pressed to reconsider the question before decided, they say "that decision was concurred in by a majority of the court, and we do not feel justified in reviewing it upon the merits."

That the point decided—the extent of the jurisdiction of the surrogate—is a matter of construction of a state statute, on which the courts of the United States are bound by law to follow the state court, does not admit of doubt. Such a decision is as clearly within the thirty-fourth section of the judiciary act as any decision can be, and it is equally clear that the point decided was that the statute of New York gave the surrogate power to issue letters of administration in two cases: *First*, when the alleged decedent is in fact dead; and, *second*, when the surrogate judicially determines that he is dead; and also that the meaning of the statute is that such determination of the surrogate is conclusive in favor of an innocent party who has, on the faith of the letters so issued, dealt with the administrator, and against the supposed decedent, though he was, in fact, alive.

But while this court must follow and adopt this same construction of the statutes of New York, the question whether, by these statutes and the proceedings taken under them, the plaintiff has been "deprived of his property without process of law" is one on which the decision of the state court is not controlling, and is entitled only to so much weight and authority as the reasoning of the court shall give to their opin-

ion. By the fourteenth amendment to the constitution of the United States, adopted prior to the present transaction, it is provided, among other things, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Prior to the adoption of this amendment there was no constitutional inhibition upon the states preventing them from depriving persons of their property without due process of law, except such as may have been contained in their own constitutions. The fifth amendment of the constitution of the United States provided that no person "shall be deprived of life, liberty, or property, without due process of law;" but it was early held that this was restrictive only on the powers of the government of the United States, and not upon those of the states. *Barron v. Mayor, etc., of Baltimore*, 7 Pet. 243. Although the constitution of the state of New York contains the same restriction upon its government, yet the interpretation of that constitution, like the construction of any other statute of the state, is a matter in which the federal courts are bound to follow the decision of the highest judicial tribunal of that state. *Webster v. Cooper*, 14 How. 488, 504.

In the case of *Roderigas v. Savings Institution*, 63 N. Y. 460, one of the learned judges, who delivered the opinion of the majority of the court, expressed the opinion that the statutes under consideration, as applied in that case, could not be regarded "as divesting a person of his property, or interfering with rights, without due process of law, in violation of a constitutional right." Per *Miller*, J. P., 473. Although it does not appear in the opinions given that the judges specially referred to the prohibitory provision in the fourteenth amendment to the constitution of the United States, yet, as the provision in the constitution of the state of New York is substantially the same, it must be assumed, since otherwise the judgment rendered could not have been given, that, in the opinion of the four judges who concurred in the

decision, the plaintiff was not deprived of his property without due process of law. But whether the three dissenting judges dissented on this or on some other ground does not appear. The weight of this case, as an authority on a point on which it is not controlling, is, however, greatly impaired by the dissent of three out of the seven judges constituting the court, there being nothing to show that they did not dissent on this very ground.

In considering this question the first inquiry is whether, by force of the laws of New York and of the proceedings under them, if they are held valid, the plaintiff has been "*deprived of his property*" by the state of New York, within the meaning of the constitutional provision; for if he has not been deprived of his property, or if he has not been so deprived by the state of New York, it necessarily follows that the constitutional provision has not been violated, and it need not be further considered whether the means employed in doing what has been done are properly described as "due process of law." An examination of the opinions in the case of *Roderigas v. Savings Institution* shows that the court did not hold that for all purposes and in favor of all persons, as against the supposed decedent, the title to his property vested in the administrator, but only that it so vested in favor of innocent third persons who had dealt with the administrator on the faith of the letters.

The case before the court did not call for anything further than this, and I think it is entirely consistent with the opinions delivered that, if the defendant had not paid the deposit to the administrator, and the supposed decedent had himself demanded it, the proceedings in the surrogate's court and the issue of the letters would not have been held to be a defence. In other words, the decision was not strictly that by virtue of the appointment of the administrator and the issue of the letters the *title* passed, as it undoubtedly does in the case of a deceased person, but that for the protection of the defendant and for equitable reasons the supposed decedent was estopped to deny, as against the defendant, that the letters were valid; that the fact of death was as found by the sur-

rogate, and the title had passed. There can, however, be no doubt that the raising of an estoppel against a person claiming his property is, to all intents and purposes, depriving him of it, within the meaning of such a constitutional provision, as truly as the actual vesting of the title to it in another would do. It absolutely and entirely deprives him of the use and enjoyment of it.

In the recent case of *Mann v. Illinois*, 94 U. S. 113, it was held that a statute of Illinois, regulating the price which warehousemen should charge for the use of their warehouses, did not deprive them of their property within the meaning of the fourteenth amendment, because the owners having devoted it to a public use the public acquired the right for the common good to control that use, at least to the extent of making reasonable regulations in respect to the price the owner should charge. But no doubt whatever was expressed that the taking away from the owner of the use of property strictly private would be depriving the owner of it within the meaning of this constitutional prohibition, and the two justices who dissented from the opinion put their dissent partly on the ground that such restriction upon or regulation of the use of property by its owner was depriving him of it within the meaning of this amendment.

Full effect, clearly, cannot be given to this restrictive clause according to its plain sense, considering the purpose it was intended to subserve as a protection against encroachment on private rights, unless it be held to prohibit not only the deprivation of the legal title, but also the impairment of the possession, use or enjoyment by the owner of his private property, subject of course to that power which exists in every civilized state by law to regulate the conduct of its inhabitants, and their use of their property, so that they shall not unnecessarily injure others, according to the ancient maxim, "*sic utere tuo ut alienum non lædas*," of which maxim and its application the case last cited is a striking example.

In construing that other restrictive clause of the constitution which prohibits the states from passing any law which impairs the obligation of contracts, Mr. Chief Justice Taney, de-

livering the opinion of the supreme court, says: "It would be unjust to the memory of the distinguished men who framed it to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life. It was undoubtedly adopted as a part of the constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union, by placing them under the protection of the constitution of the United States; and it would but ill become this court, under any circumstances, to depart from the plain meaning of the words used, and to sanction a distinction between the right and the remedy, which would render this provision illusive and nugatory—mere words of form, affording no protection and producing no practical results."

Accordingly the supreme court has uniformly held that any law subsequent to the making of a contract, materially impairing the remedies for its enforcement to which the obligee was entitled at the time it was made, is void as impairing the obligation of the contract. *Bronson v. Keege*, 1 How. 318. And in *Green v. Biddle*, 8 Wheat. 75, Mr. Justice Washington says: "Nothing, in short, can be more clear upon principles of law and equity than that a law which denies to the owner of land a remedy to recover the possession of it when withheld by any person, however innocently he may have obtained it, or to recover the profits received from it by the occupant, or which clogs the recovery of such possession and profits by conditions and restrictions tending to diminish the value and amount of the thing recovered, impairs his right to and interest in the property. If there be no remedy to recover the possession, the law necessarily presumes a want of right to it. If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may indeed subsist and be acknowledged, but it is impaired and rendered insecure according to the nature of such restriction."

Further citations are clearly unnecessary for the proposition that in the construction of this constitutional prohibition

no just distinction can be made between the owner's title and his possession, between his abstract right of property and those incidents of use and enjoyment which constitute the value of ownership, or between a law or proceeding which purports to effect a change of title and one which purports to estop him from recovering the possession of the property, while not denying his title. Nor can there be any doubt that if the plaintiff is deprived of his property by the decision of the surrogate that he is dead, made binding and conclusive upon him by act of the legislature, he is deprived of his property by the state, within the meaning of the constitution. The prohibition clearly extends to the action of the state, through any or all of the departments, legislative, executive or judicial.

The principal question, however, still remains whether the plaintiff in this case, who, by the statutes of New York, as construed by its courts, and by the proceeding had under those statutes, would clearly be deprived of his property—that is, of his claim against his debtor, the defendant—would be so deprived of it “*by due process of law.*” If he would not be he has no ground of complaint in this court.

The term, “due process of law,” as used in the fourteenth amendment of the constitution of the United States, is the same expression used in many of the state constitutions and in the fifth amendment, above referred to. Its meaning has been many times expounded by the supreme court.

In *Walker v. Sanvinet*, 92 U. S. 92, Mr. Chief Justice Waite says: “A state cannot deprive a person of his property without due process of law, but this does not necessarily imply that all trials in the state court affecting the property of persons must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the constitution and laws of the United States made in pursuance

thereof, or with any treaty made under the authority of the United States. Here the state court has decided that the proceeding below was in accordance with the law of the state, and we do not find that to be contrary to the constitution or any law or treaty of the United States."

In *Kennard v. Louisiana*, 92 U. S. 480, where the law of a state provided for a proceeding by rule before a court for testing the right to an office, and the party whose right was disputed was required to put in his answer within 24 hours, and then the case was to be tried immediately before the judge, without a jury, and in preference to all other causes, and the law imposed the burden of proof upon the incumbent, and in favor of the party who held the governor's commission, it was held that this was due process of law within the meaning of the fourteenth amendment. Mr. Chief Justice Waite there says: "The sole question presented for our consideration in this case, as stated by the counsel for the plaintiff in error, is whether the state of Louisiana, acting under the statute of January 15, 1873, through her judiciary, has deprived Kennard of his office without due process of law. It is substantially admitted by counsel in the argument that such is not the case if it has been done 'in the due course of legal proceedings, according to the rules and forms which have been established for the protection of private rights.' We accept this as a sufficient definition of the term 'due process of law' for the purposes of the present case. The question before us is not whether the courts below having jurisdiction of the case and the parties have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the constitution." He then reviews the statute in detail, and says: "There is here no provision for a technical *citation*, so called, but there was in effect provision for a rule upon the incumbent to show cause, etc. \* \* \* He was to be told when and where he must make his answer. \* \* \* He had an opportunity to be heard before he could be condemned. This was 'process,' and when served it was sufficient to bring the incumbent into court,



and to place him within its jurisdiction." And the court, in conclusion, say:

"From this it appears that ample provision has been made for the trial of the contestation before a court of competent jurisdiction, for bringing the party against whom the proceeding is had before the court and notifying him of the case he is required to meet, for giving him an opportunity to be heard in his defence, for the deliberation and judgment of the court, for an appeal from this judgment to the highest court of the state, and for hearing judgment thereon. A mere statement of the facts carries with it a complete answer to all the constitutional objections urged against the validity of the act. The remedy provided was certainly speedy, but it could only be enforced by means of orderly proceedings, in a court of competent jurisdiction, in accordance with rules and forms established for the protection of the rights of parties."

In the *United States v. Cruikshank*, 92 U. S. 554, the supreme court again say: "The fourteenth amendment prohibits a state from depriving any person of life, liberty or property without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat. 244, it secures the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

In the case of *Bank of Columbia v. Okely*, 4 Wheat. 235, last referred to, it was held that a statute of Maryland, incorporating a bank and giving to the corporation a summary process by execution, in the nature of an attachment against its debtors, who had, by an express consent in writing, made the bonds, bills or notes by them drawn or indorsed negotiable at the bank, was not repugnant to the constitution of the state of Maryland, which provided that "no freeman ought to be imprisoned, etc., or deprived of

his life, liberty or property but by the judgment of his peers, or the law of the land."

Referring to this provision, and that contained in the constitution of the United States, the court say: "What was the object of these restrictions? It could not be to protect the citizen from his own acts, for it would have operated as a restraint upon his rights. It must have been against the acts of others. But to constitute particular tribunals for the adjustment of controversies among them, to submit themselves to the exercise of summary remedies, or to temporary privation of rights of the deepest interest, are among the common incidents of life. Such are submissions to arbitration, such are stipulation bonds, forthcoming bonds, and contracts of service; and it was with a view to the voluntary acquiescence of the individual, nay, the solicited submission to the law of the contract, that this remedy was given. By making the note negotiable at the bank the debtor chose his own jurisdiction. In consideration of the credit given him he voluntarily relinquished his claim to the ordinary administration of justice, and placed himself only in the situation of an hypothecator of goods, with power to sell on default, or a stipulator in the admiralty, whose voluntary submission to the jurisdiction of the court subjects him to personal coercion. It is true, cases may be supposed in which the policy of a country may set bounds to the relinquishment of private rights; and this court would ponder long before it would sustain this action, if we could be persuaded that the act in question produced a total prostration of the trial by jury, or even involved the defendant in circumstances which rendered that right unavailing for his protection."

This case is important as showing to what extent the express assent of the party to the relinquishment of constitutional guaranties for the protection of his rights of property will obviate the constitutional objection to the want of ordinary judicial proceedings for taking it from him. In *Murray's Executors v. Hoboken Land & Insurance Company*, 18 How. 272, it was held that the taking of property to satisfy a claim against a tax collector for a balance due the gov-

ernment under a distress warrant issued by the solicitor of the treasury, pursuant to an act of congress, was not depriving the owner of his property without "due process of law," within the meaning of the fifth amendment to the constitution. It was held that "due proceess" was not necessarily and exclusively judicial process; that the term included process for the collection of taxes, and that the process for collection of a balance due from a tax collector by such a warrant was sustained as due process by the practice of the government in these states, and in England before the adoption of the constitution.

Mr. Justice Curtis, in giving the opinion of the court, says: "Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of the amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists some other provision which restrains congress from authorizing such proceedings. For, though 'due process of law' generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, yet this is not universally true. There may be, and we have seen that there are, cases under the law of England after *Magna Charta*, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands and goods of certain public creditors without any such trial."

But, perhaps, as full, precise and well considered an exposition of this constitutional guaranty as has been made is furnished by the supreme court of the state of New York in the case of *Taylor v. Porter*, 4 Hill, 145. Mr. Justice Bronson there says: "The words 'by the law of the land,' as here used, (*i. e.*, in the state constitution,) do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into nonsense. The

people would be made to say to the two houses 'you shall be vested with the legislative power of the state, but no one shall be disfranchised, or deprived of any of the rights or privileges of a citizen, unless you pass a statute for that purpose;' in other words, 'you shall not do the wrong unless you choose to do it.' The section was taken, with some modifications, from a part of the twenty-ninth chapter of *Magna Charta*, which provided that no freeman should be taken or imprisoned, or be disseized of his freehold, etc., but by lawful judgment of his peers or *by the law of the land*.

"Lord Coke, in his commentary upon this statute, says that these words, 'by the law of the land,' mean by the due course and process of law, which he afterwards explains to be 'by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law.' 2 Inst. 45, 50. In North Carolina and Tennessee, where they have copied almost literally this part of the twenty-ninth chapter of *Magna Charta*, the terms 'law of the land' have received the same construction. 1 Dev. 1; 10 Yerger, 59. The meaning of the section, then, seems to be that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation. But if there can be a doubt upon the first section of the seventh article, there can, I think, be none that the seventh section of the same article covers the case. 'No person shall be deprived of life, liberty or property *without due process of law*, nor shall private property be taken for public use without just compensation.'

"In the *Matter of Albany Street*, 11 Wend. 149, where it was held that private property could not be taken for any other than public use, Chief Justice Savage went mainly upon the implication contained in the last member of the clause just cited. He said: 'The constitution, by authoriz-

ing the appropriation of private property to public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another.' And in *Bloodgood v. The Mohawk & Hudson R. R. Co.* 18 Wend. 59, Mr. Senator Tracy said: 'The words should be construed as equivalent to a constitutional declaration that private property, without the consent of the owner, shall be taken *only* for the public use, and then only upon a just compensation.'

"I feel no disposition to question the soundness of these views, but still it seems to me that the case stands stronger upon the first member of the clause, 'No person shall be deprived of life, liberty or property *without due process of law*.' The words '*due process of law*,' in this place, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection against legislative encroachment is extended to life, liberty and property, and if the latter can be taken without a forensic trial and judgment, there is no security for the others. If the legislature can take the property of A. and transfer it to B., they can take A. himself and either shut him up in prison or put him to death. But none of these things can be done by legislation. There must be '*due process of law*.'"

These authorities would seem to be more than sufficient to establish the proposition that it is not competent for a state, by a law declaring a judicial determination that a man is dead, made in his absence, and without any notice to or process issued against him, conclusive for the purpose of divesting him of his property, and of vesting it in an administrator for the benefit of his creditors and next of kin, either absolutely or in favor of those only who innocently deal with such administrator. The immediate and necessary effect of such a law is to deprive him of his property without any process of law whatever as *against him*, although it is done by process of law against other people, his next of kin, to whom notice is given.

Such a statutory declaration of estoppel by a judgment to which he is neither party nor privy, which has the immediate effect of divesting him of his property, is a direct violation of this constitutional guaranty. No such thing is known to the law as a judgment to which a person is neither a party nor a privy being conclusive against him. This has been repeatedly declared in the most emphatic terms by the supreme court of the United States. While, on the other hand, one who is a party or a privy to a judgment is conclusively bound thereby, and by the determination of every question necessarily determined therein; even by the determination of a fact essential to the jurisdiction of the court, so that he cannot impeach the decree collaterally by denying that fact, but is limited to those remedies provided for reviewing the decree by an appellate court.

Thus, in the case of *The Mary*, 9 Cr. 144, Mr. Chief Justice Marshall says: "The whole world, it is said, are parties to an admiralty cause. The reason on which this *dictum* stands will determine its extent. Every person may make himself a party, and appeal from the sentence, but notice of the controversy is necessary in order to become a party, and it is a principle of natural justice, of universal obligation, that, before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself."

In *Hollingsworth v. Barbour*, 4 Pet. 475, the same court adopt the language used by the circuit court below, and say: "It is an acknowledged general principle that judgments and decrees are binding only upon parties and privies. The reason of the rule is founded on the immutable principle of natural justice that no man's right should be prejudiced by the judgment or decree of a court without an opportunity of defending the right. This opportunity is afforded, or supposed to be afforded, by a citation or notice to appear, actually served; or, constructively, by pursuing such means as the law may, in special cases, regard as equivalent to personal service. The course

of proceedings in admiralty causes, and some other cases where the proceeding is strictly *in rem*, may be supposed to be exceptions to the rule. They are not properly exceptions. The law regards the seizure of the thing as constructive notice to the whole world, and all persons concerned in interest are considered as affected by this constructive notice. But, if these cases do form an exception, the exception is confined to cases of the class already noticed, where the proceeding is strictly and properly *in rem*, and in which the thing condemned is first seized and taken into the custody of the court."

In *Walden's Lessees v. Craig's Heirs*, 14 Pet. 154, the same court says: "It is admitted that the service of process or notice is necessary to enable a court to exercise jurisdiction in a case, and if jurisdiction be taken where there has been no service of process or notice the proceeding is a nullity. It is not only voidable, but it is absolutely void." In *Shelton v. Tiffin*, 6 How. 186, the same court says: "Had the circuit court which rendered that judgment jurisdiction of the case? \* \* \* No process was served upon L. P. Perry, nor does it appear that he had notice of the suit until long after the proceedings were had. But there was an appearance by counsel for the defendants, and defence was made to the action. This being done by a regularly practicing attorney it affords *prima facie* evidence, at least, of an appearance in the suit by both the defendants. Any individual may waive process and appear voluntarily."

The court then discusses the evidence tending to show that the attorney was not authorized by L. P. Perry to appear, and proceeds: "But the appearance by counsel, who had no authority to waive process or to defend the suit for L. P. Perry, may be explained. An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages, but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must

be considered a nullity, and consequently did not authorize the seizure and sale of his property."

In *Boswell's Lessees v. Otis*, 9 How. 360, the same court say: "It may be difficult, in some cases, to draw the line of jurisdiction so as to determine whether the proceedings of a court are void or only erroneous; and in such cases every intendment should be favorable to a purchaser at a judicial sale. But the rights of all parties must be regarded. No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice and an opportunity to make his defence."

In *Nations v. Johnson*, 24 How. 203, the same court say: "Notice to the defendant, actual or constructive, however, is essential to the jurisdiction of all courts, and it was held by this court in *Webster v. Reid*, 11 How. 460, that when a judgment is brought collaterally before the court as evidence it may be shown to be void on its face by want of notice to the person against whom it is entered."

So in *Bloom v. Burdick*, 1 Hill, 139, the supreme court of New York, by Mr. Justice Bronson, say: "The surrogate undoubtedly acquired jurisdiction of the subject-matter, on the presentation of the petition and account, but that was not enough. It was also necessary that he should acquire jurisdiction over the *persons* to be affected by the sale. It is a cardinal principle in the administration of justice that no man can be condemned or divested of his right until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way be brought into court, and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject-matter was not within its cognizance. This is the rule in relation to all courts, with only this difference, that the jurisdiction of a superior court will be presumed until the contrary appears, whereas an inferior court, and those claiming under its authority, must show that it had jurisdiction."

In *Thompson v. Somlie*, 2 Pet. 169, the supreme court quotes and adopts the following language: "When a court



has jurisdiction it has a right to decide every question that occurs in the cause, and, whether its decisions be correct or not, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought in opposition to them, even prior to a reversal." This last case is an authority for the position that as against persons who were parties to the cause or proceeding, and those in privity with them, the determination of every fact, including facts which the court must find in order to maintain its jurisdiction of the cause, is final and conclusive as against a party unless reversed, and cannot be disputed by such party in any collateral proceeding or suit. The plain ground of this doctrine is that even jurisdictional facts, so called, may be put in issue, and the court has authority and jurisdiction to try that issue, and what is or may be put in issue in a cause is, upon the strongest grounds of public policy, conclusively determined by judgment as between those who are parties to the cause, unless reversed by an appellate court. This doctrine, as applicable to what are called jurisdictional facts, is recognized by the courts of New York. *Dyckman v. Mayer*, 5 N. Y. 434. See, also, *In re Griffith*, 18 N. B. R. 510.

These authorities show very clearly what are the essentials of "due process of law," in reference to any judicial proceeding which, directly or indirectly, operates to deprive any person of his property or its beneficial use or enjoyment, or the recovery of its possession in the courts. What is absolutely indispensable is, unless he has consented to the act of deprivation, that he shall have notice of the proceeding, either actual, or, in proper cases, constructive, by publication or by seizure of the thing itself; and that he shall have an opportunity to be heard in defence of his right or title. If the proceeding is wanting in these essentials, then, by the principles of the common law, whatever force and effect the judgment may otherwise have, it cannot bind him; he is not, and cannot be treated as a party to the judgment without a violation of what is regarded as a fundamental rule of natural

justice. This rule of the common law is obviously intimately connected with the constitutional prohibition upon the states and the general government, forbidding them to deprive any person of his property without "due process of law."

Those constitutional guaranties were devised and intended to perpetuate and guard against legislative and judicial infringement this principle of English and American liberty. Indeed, some eminent authorities have gone so far as to say that, independently of the constitutional restrictions on the powers of government embraced in the prohibitions against the violation of the obligation of contracts, and the taking of private property from one person and giving it to another without due process of law, the legislative power in these states does not extend so far on the ground that such encroachments on private rights are not a proper subject of governmental action. By *Story, J., Williamson v. Leland*, 2 Peters, 657; by *Bronson, J., Taylor v. Porter*, 4 Hill, 144.

Tested by these authorities, the proceedings by which, if they are valid, the plaintiff has been deprived of his property cannot be considered due process of law. Without any process whatever, so far as he is concerned, and without notice to him, actual or constructive; without his having any opportunity to be heard in defence of his title, and by force of a decree or decision of a court thus made which is declared by statute to be conclusive of the fact found that he is dead, the title to this property, which belongs to him, is transferred to another. The fact that other persons, his next of kin, had notice, is immaterial. Their interest in the matter is adverse to him, and if the proceedings were by "due process of law" as to them, that cannot make them so as to him.

In fact, the whole proceeding is based on the idea that there was no longer any such person as this plaintiff, and consequently the statutes made no provision whatever for notice to or process to be served on him. He was not in any sense a party to the proceeding, and, according to the principles of common law, the decision was not binding upon him. As repeatedly held by the supreme court the decision by the surrogate, as against him, that he is dead, cannot be regarded

as a valid judgment against him. It is void for want of the essential and vital ingredients of a judgment.

The proceeding was not a proceeding *in rem*, so that the seizure of the property itself by the officer of the court could be considered as constructive notice. There was no seizure anterior to the decree or judgment declared to be binding on him. In all proceedings *in rem* the seizure precedes and supports the decree. Here the decree is relied on as justifying a possession subsequently taken. Nor was his property taken under the taxing power of the state, where the "due process of law" may be, in the first instance, at least, an executive process, and not a proceeding by judicial forms. *Murray's Lessees v. Hoboken L. & I. Co. ut supra; Davidson v. New Orleans*, 96 U. S. 162.

It is, however, insisted that the proceedings are by "due process of law," because, by going out of the state and remaining away for so long a time, the plaintiff subjected his property to the operation of the laws of the state. It is also claimed that a presumption of death arose from his absence for more than seven years. In the case of *Roderigas v. East River Savings Institution*, 63 N. Y. 473, Judge Miller gives as a reason why the statute making the finding of the surrogate conclusive on the supposed decedent, in favor of innocent persons dealing with the administrator, is not to be regarded as taking his property without due process of law, that it is competent for the legislature "to provide safeguards for the protection of innocent persons who act under the decree of a competent court, and thus remedy the evils which would result from a want of such power." He says: "At most such laws are but regulations in regard to a subject of general interest to the community, and are essential to the welfare of society, the promotion of justice, and the proper administration of estates. In the case at bar it was no fault of the defendants that they paid the demand to an administrator duly qualified, and the blame, if any, rests with the party who, by a long absence, placed himself in a position where he was supposed to be dead."

This justification of the statute is an attempt to bring this

legislation within the limits of that large class of state legislation generally known as the police power of the states, which has been said to comprehend, in its widest sense, "the whole system of internal regulation by which the state seeks not only to preserve the public order and to prevent offences against her authority, but also to establish, for the intercourse of one citizen with another, those rules of justice, morality and good conduct which are calculated to prevent a conflict of interests, and to insure to every one the uninterrupted enjoyment of his own, as far as is reasonably consistent with a like enjoyment of equal rights by others. It extends, says another eminent judge, to the protection of the lives, limbs, health, comfort and quiet of all persons, and of all property within the state, as exemplified in the maxim, *sic utere tuo ut alienum non ledas*. *Thorp v. Railroad*, 27 Vt. 147." By Clifford, J., dissenting, *Tennessee v. Davis*, S. C. U. S., October term, 1880. Judge Miller also says, (63 N. Y. 474:) "While a person is thus absent creditors may attach his property, the state may dispose of his real estate by a sale for taxes, and the local authorities of a municipality by an assessment sale."

No question can be made of the power and right of the state to provide by law for the application of the property of absent persons to the payment of their just debts. This is one of those cases in which the courts have recognized the giving of notice by publication according to law after an attachment as constructive notice, and such an attachment and publication would unquestionably be due process of law. So the right to levy on property for taxes is recognized as "due process of law," where, by long usage, and the necessity of the case, judicial "process" is not required. But it may well be doubted whether any state ever provided for applying the property of an absent defendant to the payment of the owner's debts without an attachment, which is a seizure of the thing itself, or without publication, which is the best form of notice the circumstances admit of. Certainly the state of New York never passed such a law. On the contrary, the rights of absent defendants to "due process of law" are in these respects carefully guarded. The refer-

ence, therefore, to the power to subject the property of absent persons to attachment for their debts does not tend to show that the process in this case was "due process of law," but rather the contrary; all the ordinary incidents of such process which alone make it "due process" are wanting. Nor is the object and design of the laws in question to apply the property to the payment of debts. Though that is incidentally provided for, their chief object, as well as their chief effect, is to distribute it among the supposed next of kin, who have in fact no right to it.

There can be no question, also, that it is within the power, and is the duty, of the state to provide all proper safeguards for the protection of innocent persons who have been led into mistake, to their injury, by the action of the surrogate, or otherwise; but, as it seems to me, this laudable and proper legislation must stop where it will operate to deprive another innocent person of his property for their benefit. There are some misfortunes that even the most innocent cannot be protected against by the power of the state. Such is the case of persons who are innocently misled into the belief that void judgments are valid, as in the case of a suit carried on against a person supposed to be alive, but in reality dead. *Loring v. Folger*, 7 Gray, 505; *Jochimsen v. Savings Bank*, 3 Allen, 87.

In fact, this argument for the protection of the innocent sufferer against the consequences of the acts of another, by whom he has been misled into the misfortune of parting with his money, seems to be a misapplication of the doctrine of estoppel *in pais*. If the plaintiff has, by his conduct or declarations, induced the defendant to pay this money to the person holding the letters, then he will be estopped to deny the authority of that person to receive it; but every case of estoppel *in pais* must rest on its own peculiar circumstances. The defendant has not pleaded an estoppel *in pais*, but an estoppel by record—a judgment alleged to be binding on the plaintiff. Nor has any court directly or plainly put the exemption of the defendant from liability, in a case like this, on any other ground than such an estoppel by record. Nor does it seem to me that a person remaining out of the state for however long

a time, and failing to make known to persons within the state the fact of his continued existence, imports such a representation that he is dead that another person learning of these facts, or being able by inquiry to learn them, and also to ascertain that they are the sole foundation for the issue of the letters of administration, can be said to be deceived as to any matter of fact.

The facts, indeed, are not inconsistent with continued life. The second case of *Roderigas* shows clearly that a person dealing with an administrator is held not only to knowledge of what evidence the surrogate acted on, which can be ascertained by inspection of the record, but also to inquiry as to whether he acted judicially or not—a fact which may be contrary to what appears on the face of the record. Applying this rule; and all persons dealing with a person holding letters in a case like this must be held to know that the proof of death rests wholly on evidence not inconsistent with the fact of life, and, that, therefore, if the person is alive the judgment of the surrogate that he is dead cannot be conclusive against him; there is, as it seems to me, no element of an estoppel *in pais*, because there is no deception or false representation of any fact. The party deals with the matter knowing that the supposed decedent may be alive. He knows, therefore, it would seem, that he takes or deals with his property subject to that risk. But, however this may be, there is another ground on which the doctrine of equitable estoppel clearly cannot avail to sustain this proceeding.

It is the established rule of law that no person can avail himself of the declarations or conduct of another person as an equitable estoppel or estoppel *in pais*, unless those declarations or that conduct was in fact known to him at the time he parted with value or otherwise altered his position in reliance thereon, for the very obvious reason that the ground and the only ground of the estoppel is that the party was influenced by the declaration or conduct to part with value or otherwise change his course of action. And nothing can be clearer than that declarations or conduct of one person, in order to influence the action of another, must be known to

him. *People v. Bank of North America*, 75 N. Y. 561. Now, the rule declared by the statute in question is that the innocent third person who pays out his money in reliance upon letters issued by the surrogate, regular in form, provided the surrogate determined judicially the fact of death, can, in all cases, claim the benefit of an estoppel by such a record against the supposed decedent. And the law, in its application, is not limited to cases in which the decision of the surrogate is founded on evidence as to the conduct or the voluntary acts of the supposed decedent, as for instance, his leaving the state and remaining away without communication for such length of time as has been held to raise a presumption of death for certain purposes.

The statute applies to all cases whatsoever in which, upon any competent proof, the surrogate determines that the man is dead; as, for instance, where the evidence is that he shipped on board a certain vessel which was lost at sea, or that he was killed in a railroad disaster, or shot in the streets shortly before the petition for letters was filed. It is obvious that there are very many states of proof, wholly without regard to any voluntary action of the supposed decedent, which may have resulted in the decision of the surrogate. All that a person relying on the letters, therefore, can be held to know, or be informed of by the same being communicated to him, is that, upon some competent evidence, the surrogate has found the fact of death. This clearly is not, in itself, any knowledge of any conduct on the part of the supposed decedent.

There is not, therefore, the essential element of an equitable estoppel, that the party relied on the conduct of the party—that is, upon his voluntary and unexplained absence—for that is not implied in the surrogate's finding, even if such absence would, in any case, work an estoppel. If this statute were limited to the single case of a person who had left the state and not been heard from for a certain length of time, then there would be some force in the argument that a person relying on the letters was influenced by his knowledge of the fact, because in that case the letters could not

properly issue, except on proof of that fact to the satisfaction of the surrogate. There is, therefore, no ground for holding that the rule of the statute can be defended on the principles of estoppel *in pais*.

As to this particular case there is no evidence that the defendant knew or relied on anything but the New York letters. There is no evidence that the defendant knew or inquired upon what evidence Lavin was found by the surrogate to be dead. And if they had seen the proofs exhibited to the surrogate they would not have given any information as to any voluntary act or conduct of the plaintiff, except that he was absent from Rhode Island without proof of his being alive. Therefore the defendant cannot be held to have been influenced by the plaintiff's alleged conduct in absenting himself from the state for so long a time without communication. Any further discussion of the doctrine of equitable estoppel, as applied to the case, is unnecessary.

The position taken that all persons hold their property subject to existing laws must be conceded, with some very important limitations. Unquestionably all persons within the jurisdiction of the state hold their property subject to restriction as to its use by the exercise, on the part of the state, of the police power already referred to, and, in this sense, subject to the laws of the state, whether enacted before or after the title was acquired. But the laws must be valid and constitutional laws. The state cannot take away from property the essential character of property. It cannot, under cover of the exercise of the police power, make property already acquired, or thereafter to be acquired, subject to be taken away from its owner without due process of law. It could not pass a general law providing as to all after-acquired property that it should be held on the tenure or condition that, in certain prescribed cases, it should be taken from the owner and given to another without any form of judicial proceeding, without notice or an opportunity to be heard.

A construction which would allow this would, in effect, allow  
v.1,no.9—43



a state, by law, to abrogate within its limits the institution of property altogether. And, although it is true that that which a man has not cannot be taken from him, yet the necessary implication of the amendment is that *property*, as generally understood, with all its necessary incidents, shall forever be preserved within the limits of the Union. Nor can it be claimed that this particular statute can be sustained as not depriving persons of their property without "due process of law," on the ground that it is a well recognized and defined case, in which, from necessity and by long usage, anterior to the establishment of the constitution, process other than judicial, and wanting in the essential parts of *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceeding has become "due process of law," as was held in respect to the executive warrant against a tax collector; for, on the contrary, this statute, as construed by the court of appeals, is conceded to be a novelty in legislation.

This mode of depriving a living person of his estate, by holding him concluded by a surrogate's decision that he is dead, has no support elsewhere in the authority of the English or American courts, so far as is shown. It has been by courts of the highest authority declared or treated as a legal impossibility. *Jochimsen v. Suffolk Savings Bank*, 3 Allen, 87; *Allen v. Dundas*, 3 T. R. 125; *Griffith v. Frazier*, 8 Cranch, 9; *Melia v. Simmons*, 45 Wis. 334; *Morgan v. Dodge*, 44 N. H. 259; *Duncan v. Stewart*, 25 Ala. 408; *McPherson v. Cauliff*, 11 S. & R. 422; *Bolton v. Jacks*, 6 Robt. 190. See, also, 15 Am. L. Reg. 212.

Every restriction on the power of the states contained in the national constitution may be expected, in some instances, to involve some hardship; and in this case it may be that the protection in this way of an innocent person who had, under a mistake as to the fact, lost his money by paying it to a person having no authority to receive it, might, in a certain sense, be considered humane, and if it were lawful, and infringed no one's rights, proper and commendable. But these restrictions upon legislation and judicial power are imposed

because, whatever hardship may attend their application in particular instances, the principle of personal liberty embodied in them—the preservation of private rights against infringement, except with the consent of the owner, or “by due process of law”—is of paramount importance and vital to the welfare of the community. The present case seems to me to be fairly within the letter of the spirit of the constitutional guaranty.

For these reasons it must be held that the proceeding taken under the laws of New York, which are set up as justifying the defendant's refusal to pay to the plaintiff the amount of his deposits, is void as to him, because it would deprive him of his property without “due process of law.”

It is also claimed that, if the New York letters are void, the payment to the administrator may be justified under the Rhode Island letters, on the principle that though a foreign administrator cannot sue here without obtaining ancillary letters, yet a payment to him is a good payment and discharges the debt. *Parsons v. Lyman*, 20 N. Y. 103.

But it is clear that the Rhode Island letters have no greater validity than the New York letters. The Rhode Island statute undertakes to do directly what the New York statute aims to accomplish by the more indirect method of declaring a judicial decision conclusive against a person not a party to it. In Rhode Island the court does not go through the form of deciding that the person is dead, but, conceding that he is only absent, distributes his estate “as if he were dead,” without any notice or process upon him whatever.

I do not see how any respectable argument can be made that this is not depriving him of his property without due process of law, or how it can be necessary or reasonably proper for the proper government of the persons and the property within the jurisdiction of the state. That the state may make a law for taking care of abandoned estates, with proper provisions for notice to the absent or unknown owners, will not be denied, but this is not such a law. Moreover, this property was not in Rhode Island, nor subject to its jurisdiction. It was in this state. The fact that the pass-book hap-

pened to be there is immaterial. It was mere evidence of the indebtedness, and not a negotiable security for it. For these reasons the Rhode Island letters cannot avail the defendant.

I think it may be doubted whether the Rhode Island letters were such letters as are contemplated by the statutes of New York as original letters of administration, which authorize the issue of ancillary letters here at all, because they do not purport to be letters of administration on the goods and estate of a *deceased person*. But, as this point has not been argued by counsel, I have preferred not to put the decision of the case on this ground, and its further consideration is unnecessary.

Judgment for the plaintiff for \$880.26, with interest from March 1, 1879, with costs.

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UNITED STATES *v.* ANCAROLA.

(Circuit Court, S. D. New York. January 26, 1880.)

INVEIGLEMENT—INVOLUNTARY SERVICE AS STREET MUSICIAN—ACT OF JUNE 23, 1874, (18 ST. AT LARGE, 251.)

Motion for new trial.

*William P. Fiero*, Asst. Dist. Atty., for the United States.  
*Charles S. Spencer*, for defendant.

BLATCHFORD, J. On the twenty-third of June, 1874, an act was passed by congress, (18 U. S. St. at Large, 251,) entitled "An act to protect persons of foreign birth against forcible constraint or involuntary servitude."

It provides that "whoever shall knowingly and wilfully bring into the United States, or the territories thereof, any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement, or to any involuntary service, and whoever shall knowingly and wilfully sell, or cause to be sold, into any condition of involuntary servitude, any other person, for any

term whatever, and every person who shall knowingly and wilfully hold to involuntary service any person so sold and bought, shall be deemed guilty of a felony, and on conviction thereof be imprisoned for a term not exceeding five years, and pay a fine not exceeding \$5,000."

Under this statute an indictment was found in this court against the defendant, charging, first, that he unlawfully, feloniously, knowingly, and wilfully brought into the United States, to-wit, into the city and county of New York, in the state of New York, one Francesco Libonati, a person who had theretofore been inveigled in the kingdom of Italy, with intent to hold said Libonati in confinement, and to an involuntary service of begging and of playing on musical instruments. A second count was like the first, substituting "forcibly kidnapped" for "inveigled." A third count was like the first, substituting "inveigled and forcibly kidnapped" for "inveigled." A fourth count charged that the defendant unlawfully, feloniously, knowingly, and wilfully held to an involuntary service of begging and playing on musical instruments one Francesco Libonati, a person who had theretofore been unlawfully and knowingly sold by certain persons, to the jurors as yet unknown, into a condition of involuntary servitude for a term of four years and six months, and had been theretofore, by the said Ancarola, bought for the service and servitude aforesaid, and for the term aforesaid, of the persons aforesaid. A fifth count was like the third count, except that it charged the intent of the defendant to be to hold Libonati to an involuntary service.

Two other indictments, with the same charges, were found against the defendant, except that one of them related to a person named Michele Quirino, and the other to a person named Giosue Givrieri. The three indictments came on for trial before this court, held by Judge Benedict, and a jury, and were consolidated by the court under the provisions of section 1024 of the Revised Statutes, and one trial was had on them as so consolidated. The jury found the defendant "guilty of the several offences charged in the indictments." The defendant now moves on the minutes of the trial, as

settled by the judge who tried the case, for a new trial and in arrest of judgment, the motion being made at an exclusively criminal term held under section 658 of the Revised Statutes, before the circuit judge and the two district judges named in section 613 of the Revised Statutes.

The evidence given on the trial showed these facts: The defendant arrived in the city of New York on the second of November, 1879, in a steamer from Europe, having with him seven boys, of whom the three persons named in the indictment were three. He came on shore with the seven boys. Mr. Jackson, superintendent of the depot at Castle Garden, where he landed, had a conversation with him there immediately after he landed. Mr. Jackson testified: "I asked this man if those children were with him, and he said they were. I then asked his name, and he told me Ancarola. I brought him up to the register's desk, and he registered their names. I asked him where they were going, and he said to Montreal, to their relatives there. I brought them inside then, and he handed me their passage ticket to Montreal, as evidence that they were going there." The children were not allowed to go with him. He was arrested on the eighth of November. At the trial no evidence was introduced by the defendant. The chief testimony for the government was that of the three boys named in the indictments, Quirino being 13 years old, and Libonati and Givrieri being each 11 years old.

The story of Libonati is this: He was born at Calvello, Italy. His mother is living there. His father is dead. The boy was working in a blacksmith shop for two and a half cents a day, making nails. He had two sisters and a brother in Calvello, and a brother and a cousin in New York. His family were poor. He could not play upon any musical instruments. His father had gone to New York, and had died there. The boy, being at his shop, was sent for by his mother, and went and found with her her brother and the defendant. His mother asked him if he wanted to go to America, and he said "Yes." His uncle said, "Go to America with this man?" and the boy said "Yes." The defendant said to the mother, "Will you give me your son?" and she said

"Yes." He also said to her that the boy was to play the harp in Chicago. The boy said that he wanted to play the violin, but the defendant said that he must play the harp, and the boy then said that he would play the harp. The boy went with his uncle to Naples, thence he went to Marseilles and London with another boy. At London he met the defendant and other boys, and they came from London to New York in the steamer. On the way over the defendant said to the boy, "If we get arrested say we are going to Montreal." The boy had no relations in Montreal.

The story of Quirino was this: His mother is living. His father died in New York. The boy was born in Calvello, Italy, and lived there. He is a relative of the defendant. He has a sister. His family are poor. He did not work at anything, but went to school. The boy and his mother, his uncle and the defendant, being together at Calvello, it was verbally agreed between the mother and the defendant that the boy was to be four years and a half with the defendant, in Chicago, and that the defendant was to give the mother 40 ducats. The defendant said: "You live four and a half years with me, and I will teach you the business, and whatever money you make you will give to me." The mother said: "If you want to go, go; I don't want to compel you to the contrary." The uncle said the same. The defendant told the boy he would have to learn the violin, and that he would be clothed and fed. The boy said that he would go. His uncle took him from Calvello to Marseilles. There he met the defendant, who took him to London, and thence to New York in the steamer. On the way over, the defendant told the boy to tell every one that he was going to see his uncle in Montreal. He did not have an uncle in Montreal.

The story of Givrieri is this: His father and mother are living in Calvello, Italy, where he was born. He has a brother and a sister. His mother proposed to the defendant to take the boy to America. The defendant had just returned from there. He said, in the presence of the boy, that America was a good place, and he talked of the "beautiful things of America." He said to the father and mother: "If you

let your son go with me he will do very well in America and send you plenty of money bye and bye." He said several times, in the hearing of the boy, that America was a good place, and that they would make plenty of money there, and that they were going to make money for him. The boy was to work, and all the money he was to give to the defendant. The defendant was to take the boy to Chicago and teach him music, and from Chicago he would take him further. This was said in the presence of the parents. They told the defendant not to ill-treat the boy and to feed him properly, and that if they should get a letter from him saying that he was not properly treated they would come and take him away. It was then agreed that the defendant should give the father 80 ducats, and that the boy should go with the defendant for four years and be fed and clothed by him, and taught music. The boy went to Marseilles, and there the defendant found him. On the way to New York, in the steamer, the defendant said to the boy: "Let us pray to God that we can pass through New York all right. After that I will teach you music." He gave the boy a paper with an address in New York where to go, and told him not to let himself be seen by any officer for they might arrest him, and if any one asked him what he was going to do not to say that he was going with a padrone. He also told him if any one asked what his business was to say that he was a printer, and if they asked where he was going to say that he was going to Montreal, and if they asked to whom, to say that he was going to an uncle. He did not have an uncle in Montreal.

The statute of Italy of December 21, 1873, referred to in the charge of the court to the jury, was put in evidence. Portions of the charge of the court to the jury were excepted to by the defendant. One portion of the charge was as follows: "In connection with the evidence in respect to the arrangement made in Italy, it will be important for you to consider the law of Italy relating to the employment of children in wandering professions. But it must be remembered that the accused is not on trial for violating the law of Italy, and cannot be found guilty by you because of any violation

of the law of Italy that you may believe to have been disclosed by the evidence. He must be found guilty, if at all, for a violation of the laws of the United States that you have heard read. The law of Italy has been admitted in evidence as bearing upon the question of inveiglement, and solely for the purpose of showing the character of the act to which the consent of these children was obtained in Italy.

"The law of Italy provides as follows: 'Section 1. Any person who shall entrust, or, under whatever pretence, shall commit, to natives or strangers, other persons of either sex, under the age of 18 years, though his or her own children or pupils, and any native or stranger who shall receive them, with the intent to employ them in the kingdom, in whatever manner, or under whatever denomination, in the practice of wandering professions, as \* \* \* , witches, charlatans, errant players or singers, rope-dancers, guessers, fortune-tellers, animal exposers, beggars, and similar wanderers, shall be punished with imprisonment from one to three months, and fined from 51 to 250 lire.

"'Section 3. Any one who shall trust or deliver in the kingdom, or take abroad, in order to trust or deliver to natives or strangers abroad, persons under 18 years of age, however his or her own children or pupils, and any native or stranger who shall receive such persons in order to take, trust or deliver them abroad, for the purpose to employ them, in whatever way, and under whatever denomination, in the practice of wandering professions, as shown in section 1, shall be punished with imprisonment from six months to one year, and fined from 100 to 500 lire.'

"You will observe that the arrangement to which the assent of these children was procured in Italy was unlawful, provided the children were intended to be employed in a wandering profession, such as errant players, or beggars, or similar wanderers. It has been contended here that these children were not intended to be employed as wanderers, in violation of the law of Italy, because the evidence is that they were to be employed to play the harp or be musicians in Chicago. But, gentlemen, a child of 11 or 13 years of age may be a



wanderer in the streets of a great city, and if, upon considering the evidence, and what has been proved in regard to the character of the arrangement made in Italy, and the age of the children and their ability to earn money for the accused by labor, you conclude that the arrangement made in Italy in regard to those children, or either of them, contemplated the delivery of the children to the accused to be by him brought to this country for the purpose of being employed as beggars or street musicians in Chicago, and that the child was then and there enticed to consent to such an arrangement, then you will be justified in finding that such child had been inveigled in Italy." The foregoing portion of the charge was excepted to by the defendant.

After charging that it must be "proved that the accused brought the child here with the intent to hold the child when so brought to involuntary service as a beggar or as a musician," the court proceeded as follows: "Upon this question the age of the child is important, for, as you know, in regard to some things a child of such tender years is incapable of consent. The nature of the employment to which the accused intended to put the child, the evidence in regard to the arrangement made in Italy, and the ability of the child to labor or play an instrument, are important circumstances in this connection, also, for if you believe from the evidence that the intention of the accused in bringing the child to this country was to employ the child as a beggar or as a street musician, for his own profit, and that such intended employment was one injurious to its morals and inconsistent with its proper care and education, according to its condition, then you will be justified in finding that he intended to hold such child to involuntary service, as charged in the indictment; and this, notwithstanding the fact that the child had consented to the employment in Italy, and that no evidence of a subsequent dissent, while under the control of the accused, has been given."

The foregoing portion of the charge was excepted to by the defendant. The defendant also contends that there was no evidence that any of the children had been inveigled in Italy,

and no evidence that the defendant had the intent to hold any of the children to any involuntary service in this country.

"Inveigle," is defined by Worcester thus: "To persuade to something bad, to wheedle, to entice, to seduce, to beguile." He defines "entice" thus: "To allure to ill, to attract, to lure, to draw by blandishments or hopes, to decoy, to tempt, to seduce, to coax." To inveigle or persuade or entice necessarily implies that the person is persuaded or enticed, and yields assent as the result of the persuading or enticing. Yet the statute is founded on the view that the person so assenting and so inveigled may be brought here by one who knows the circumstances of the case, with the intent to hold such person to involuntary service, although the service be the one to which the inveigling related. The arrangement made in Italy was, clearly, a transfer of the children to the service of the defendant to earn money for him as street musicians in Chicago. They were of an age to be able to do so. The influence brought to bear upon them by their parents and uncles, and by the statements of the defendants, to induce them to consent, in view of their condition in life and their ages and their inexperience, was enticement and inveiglement. The charge on this subject was proper and not open to exception. *Moody v. The People*, 20 Ill. 315, 319.

In regard to the other portion of the charge, the children, in serving the defendant as street musicians, for his profit, to the injury of their morals, subject to his control, could not properly be considered as rendering him voluntary service. They were incapable of exercising will or choice affirmatively on the subject. They were cast off by their parents, in violation of the law of Italy, and their being in this country at all with the defendant was, on all the facts, really involuntary on their parts, although the sham form of their consent was gone through with. The charge seems to us entirely correct. *Moody v. The People*, 20 Ill. 315, 319; *The State v. Rollins*, 8 N. H. 550, 565. The observations already made, taken in connection with the testimony recited, show that there was ample evidence to warrant the jury in finding inveiglement in

Italy, and the intent of the defendant, with full knowledge of such inveiglement, to hold the children in this country to involuntary service to him as street musicians.

The motions are denied.

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NORTON v. THE AMERICAN RING COMPANY.

(Circuit Court, S. D. New York. April 7, 1880.)

CONTRACT — LETTER — STATUTE OF FRAUDS — COMMISSIONS. — Plaintiff offered, by letter, to sell defendant's goods for 10 per cent. commission, under an arrangement that should last for two years. Defendant replied by letter, offering plaintiff  $7\frac{1}{2}$  per cent. commission on all the goods he should sell and all the trade he should make for the defendant. Plaintiff thereupon proceeded to obtain orders for the defendant, and the latter filled them by shipping the goods to the purchasers. *Held*, (1) that the agreement was valid under the statute of frauds; (2) that the plaintiff was under no obligation, express or implied, to devote himself exclusively to the sale of the defendant's goods; and (3) that defendant was entitled to commissions on all sales made through his influence, whether, in fact, made by him or not.

Motion for new trial.

*J. H. Whitlegge*, for plaintiff.

*Jonathan Marshall*, for defendant.

WALLACE, J. The defendant moves for a new trial, alleging errors of law upon the trial, and that the verdict is against the evidence. The plaintiff sued to recover commissions alleged to be due under a contract with defendant. The evidence established that prior to July, 1873, the plaintiff and the agent of the defendant had a conversation in regard to the plaintiff selling umbrella goods for the defendant, but nothing was specially suggested on either side. July 1st, the plaintiff wrote the agent of defendant that he would sell the defendant's goods for 10 per cent. commission upon all their sales of that line of goods, but should not be willing to enter upon any arrangement unless it should be one for two years, as the hardest part of his services would consist in introducing defendant's goods to his customers. The next day the defendant's agent wrote in reply that defend-

ant could not consent to give plaintiff 10 per cent. commission on all defendant's sales, because defendant already had a trade in that line of goods, but that defendant would give plaintiff  $7\frac{1}{2}$  per cent. commission on all the goods he should sell and all the trade he should make for the defendant. Whether plaintiff replied by letter accepting the defendant's proposition is a fact in dispute, plaintiff claiming that he did reply, and the defendant that there was no reply. However the fact may have been, the plaintiff immediately proceeded to obtain orders for defendant, and defendant filled them, shipping the goods to the purchasers, until in January, 1874, the parties agreed upon a reduction of plaintiff's commission to 5 per cent., to take effect from March 1, 1874.

The business relations of the parties continued until May, 1874, when the defendant discontinued the arrangements with the plaintiff, upon the ground that plaintiff was selling goods of the same kind as the defendant's for competitors of the defendant. The evidence authorized the jury to find that there was due, above payments from defendant to plaintiff, a somewhat larger sum than that found by the verdict.

The court ruled that the evidence established a contract by which the plaintiff had the right to sell the defendant's goods for two years; that there was no condition implied that he should sell exclusively the defendant's goods; that the agreement of the parties was valid within the statute of frauds, and that the plaintiff was entitled to recover commissions on all sales made, and the trade he procured for the defendant during the two years, at the rate of  $7\frac{1}{2}$  per cent. up to March 1, 1874, and 5 per cent. thereafter.

What the contract between the parties was is to be determined by the letters which passed between them. The plaintiff's letter was a proposition to sell defendant's goods at a commission of 10 per cent. upon defendant's total sales, provided the arrangement could be made for two years. The defendant's reply was a counter proposition based upon the plaintiff's, and was an implied assent to the terms proposed by plaintiff, except so far as plaintiff's proposition was modified. This modification related only to the amount of the

commission and the basis upon which it should be computed. The two letters are to be read together, and, thus read, in legal effect defendant's letter was a proposition to pay plaintiff  $7\frac{1}{2}$  per cent. commission upon all goods he should sell, and all trade he should make for defendant for a period of two years. The condition that the arrangement should continue for two years was evidently inserted for the plaintiff's benefit. He did not agree that he would sell defendant's goods for two years, but he reserved the right so to do because his most valuable exertions would consist in introducing the defendant's goods to the favor of his customers.

In this view the agreement was not one necessarily to be performed within a year; but, assuming that it was not to be performed within a year, the letter of the defendant, read with plaintiff's letter, was a proposition in writing, the terms of which were fully expressed, which was subscribed by the party to be charged, and which, when acted upon, was assented to and became the contract of the parties.

The plaintiff was under no obligation, express or implied, to devote himself exclusively to the sale of the defendant's goods. He was no more obligated to sell exclusively for the defendant than the defendant was to sell exclusively through the plaintiff. He was to have a commission on what goods he sold and on what trade he made, but he was under no legal obligation to obtain a single order for the defendant. He was merely a broker, whose commissions depended upon the efficiency of his own services. The defendant had no more right to complain that plaintiff sold goods for others than it would if he had not endeavored to sell as many goods for the defendant as he did.

As the plaintiff did not attempt to sell any goods for the defendant after the latter notified him that the commissions were to be discontinued, and as he waived upon the trial any recovery for commissions upon sales which he might have made during the two years if defendant had not terminated the agreement, his recovery was limited to commissions upon trade actually made by him within the two years. It is in-

sisted that, inasmuch as the evidence did not show plaintiff to have been the proximate cause of each particular sale made by the defendant to purchasers originally introduced by plaintiff, it was erroneous to permit the jury to consider sales made by defendant after plaintiff had ceased to solicit orders, as a basis for the estimate of damages.

The jury were instructed that plaintiff was entitled to commissions on all the trade made by him for the defendant within the two years, and that trade made by him included all the sales made by the defendant of which the plaintiff was the inducing cause. This, of course, permitted the jury to find that he was entitled to commissions on many sales made by the defendant, in regard to which the plaintiff's intervention consisted solely in originally introducing the purchaser to the defendant. Undoubtedly, if the agreement had been for commissions upon all goods sold by the plaintiff, this would not have authorized commissions where the particular sale was not made in consequence of the plaintiff's services. But the stipulation to pay commissions not only upon all goods sold by him, but also upon all trade made, could have been made with no other intent than to secure plaintiff commissions, whether the particular sale was made by him or not, whenever it was due to his influence and the defendant derived the benefit of it. I am satisfied that there were no errors on the trial, and that the verdict of the jury, though perhaps more liberal to the plaintiff than was to be expected, cannot be considered as against the evidence.

**Motion for new trial denied.**

## CARROLL v. ERTHEILER.\*

(Circuit Court, E. D. Pennsylvania. April 6, 1880.)

**TRADE-MARK—NAME—INFRINGEMENT.**—Where the dominating characteristic of a trade-mark is a name by which the manufacturer's goods have become familiarly known to the public, another manufacturer has no right to designate his goods by that name, even though he accompanies it with a different device.

**DISTINCTION BETWEEN CIGARETTES AND SMOKING TOBACCO.**—Although the revenue laws distinguish between cigarettes and smoking tobacco, there is no such substantial difference as will justify a manufacturer of cigarettes in applying to them a name which has become the well-recognized designation of another manufacturer's smoking tobacco.

Complainant, a manufacturer of smoking tobacco, used a trade-mark consisting of the name "Lone Jack," with an accompanying device, and his tobacco became known to the public by that name. Respondent subsequently commenced manufacturing cigarettes, using a trade-mark with the name "Lone Jack," accompanied with a device different from that of complainant. *Held*, that complainant was entitled to an injunction.

**PRACTICE—EVIDENCE—PREPARATION OF AFFIDAVITS.**—Where affidavits have been prepared and printed without seeing the witnesses, and sent over the country to be signed by those who might be found willing to do so, the statements therein are not regarded with confidence by the court.

Motion for a preliminary injunction.

The bill set forth that complainant had for over 16 years manufactured smoking tobacco, and had adopted, and continuously and exclusively used during that time, a trade-mark, a prominent characteristic trait of which was the arbitrarily selected word-symbol "Lone Jack;" that he affixed this trade-mark, by means of printed labels and wrappers, to his smoking tobacco, which was put up in various styles of packages, including the form commonly known as cigarettes; that although the said word-symbol "Lone Jack" was generally used in connection with certain words, being advertisements of his name and place of business and other matter, and frequently the name of the specific article and the representation of the bust of a man smoking, still complainant's smoking tobacco came to be popularly known among merchants and consumers

\*Reported by Frank B. Prichard, Esq., of the Philadelphia bar.

by the peculiar distinctive designation of "Lone Jack," and was bought and sold under that name; that respondent, intending wrongfully to usurp complainant's reputation, and to deceive the public into supposing that they were buying complainant's tobacco, colorably imitated complainant's trade-mark, and in July, 1879, began to affix to goods of substantially the same descriptive properties as complainant's the word-symbol "Lone Jack," and to sell smoking tobacco wrapped in papers and bearing a label containing, as its most prominent characteristic, *the said word-symbol*, and that the public had been deceived thereby into buying respondent's tobacco, supposing it to have been manufactured by complainant. The bill prayed for an injunction and account.

The answer denied that complainant had any proprietary or exclusive interest in the word-symbol "Lone Jack" by itself, and alleged that complainant's trade-mark only gave him the right to use the words "Lone Jack" in connection with the words "The Celebrated" above the bust of a man smoking a pipe, and with the words on each side of said bust, "Or seek no further, for better can't be found," and below said bust the words "Smoking tobacco, manufactured by John W. Carroll, Lynchburg, Virginia." It denied that complainant had ever applied said trade-mark to cigarettes, or to any other article than smoking tobacco, or that he had made or sold cigarettes by the name of "Lone Jack." It alleged that what is known by smokers and to the trade as smoking tobacco is a distinct article of merchandise from cigarette tobacco, and cannot be used for the manufacture of cigarettes, and that cigarette tobacco paid a special tax to the United States government. It further alleged that respondent had, in May, 1879, adopted and was entitled to a trade-mark for cigarettes consisting of the words "Lone Jack" above and the word "Cigarettes" below the figure of the jack of spades, and the name "Ertheiler & Co., New York," below, and "The best" below all; and that the sales of cigarettes under this trade-mark were the only sales by defendant complained of by plaintiff. The answer further denied that there



was any resemblance between the trade-marks, or any attempt at imitation; or that respondent had any intention to usurp complainant's reputation, or deceive the public; or that the public were deceived. Both parties filed affidavits in support of the facts respectively alleged in the bill and answer.

*William Henry Browne and George Harding*, for complainant.

*Field, Dorsheimer, Bacon & Deyo*, for respondent.

BUTLER, J. It would be unwise to say more at this time than is necessary to explain the action of the court in disposing of the interlocutory motion now before it. The plaintiff's exclusive right to the trade-mark, as a designation of his smoking tobacco, is not doubted.

The defence rests upon a denial—*first*, that the defendant has used the trade-mark; and, *second*, that he has used it as a designation of "smoking tobacco." The second branch may, most conveniently, be noticed first. While the revenue laws, for purposes of taxation, distinguished between smoking tobacco and cigarettes, there is, we believe, no substantial difference. Cigarettes consists of smoking tobacco, similar in all material respects to that used in pipes. The circumstance that a longer "cut" than that commonly used in pipes is most convenient for cigarettes is not important, nor that the tobacco is smoked in paper instead of pipes. It may all be used for either purpose, and is all embraced in the term "smoking tobacco."

We do not believe the public or the trade draw such a distinction as the defendant sets up. We have not overlooked the statements contained in his affidavits, but the method pursued in obtaining this testimony, generally, does not recommend it to our confidence. The affidavits seem to have been prepared without seeing the witnesses, and sent over the country to be signed by those who might be found willing to sign them. They are, generally, similar in language, and printed. This method of obtaining testimony is not worthy of encouragement. If the public and trade draw such a distinction, and, therefore, do not suppose the defendant's cigarettes to be made of the plaintiff's tobacco, (and the defendant

so understands,) why does he adopt the designation by which this tobacco is familiarly known, and persist in using it?

The dominating characteristic of the plaintiff's trade-mark is the name "Lone Jack." His tobacco has come to be known and described by this name, throughout the country, to such an extent that the accompanying device has ceased to be important, if it ever was so,—doubtless rarely observed, and slightly remembered. At home and abroad, to the trade and the public, it is familiarly known as "Lone Jack," and is thus designated as the plaintiff's manufacture by purchasers and sellers.

The defendant's application of this name to his smoking tobacco is an adoption and use of the essential part of the plaintiff's trade-mark. Surrounding it with a different device signifies nothing to the public, who attach no importance to the device of the plaintiff. The defendant's name upon the cigarettes, if recognized, (and it would not be without close inspection,) would not inform the public that the tobacco is not of the plaintiff's manufacture. That the defendant's act is calculated to mislead can hardly be doubted; that it has misled, the plaintiff's affidavits, we think, show; and the inference that the defendant supposed it would mislead, and intended it should, cannot well be avoided. Why otherwise did he adopt this particular name? He knew it to be the recognized designation of the plaintiff's tobacco, which had become popular with consumers and the trade. Did he not expect the public to be influenced thereby and his business increased? An affirmative answer cannot well be avoided. If he did not, however, the injunction will do him no harm, for he has not yet had time to establish a reputation of his own under this name.

Whether the plaintiff commenced putting up his tobacco in the form of cigarettes before the defendant applied the designation "Lone Jack" to his cigarettes need not be considered at this time.

The law involved is, we believe, well settled, and is so fully stated in every aspect suggested by the learned counsel for the defendant in *McLane v. Fleming*, 6 Otto, 245, and *Singer*

*Swing Machine Co. v. Wilson*, 3 Law Reports, (appeal cases,) 376, that no more is deemed necessary than a reference to these cases.

A preliminary injunction as prayed for will be granted.

An injunction was subsequently issued restraining respondent, until the further order of the court, from selling cigarettes or smoking tobacco in any form bearing the trade-mark "Lone Jack."

NOTE.—See *Sawyer v. Horn*, ante, 21.

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JOHNSTON, Receiver, etc., v. ROE and others.

(Circuit Court, E. D. Missouri. April 9, 1880.)

**EQUITABLE JURISDICTION OF FEDERAL COURTS—STATUTE OF LIMITATIONS.**—A federal court will assume equitable jurisdiction of a suit by a receiver of a bank against the estate of a decedent for the recovery of a debt alleged to have been fraudulently concealed, although the claim is barred by the statute of limitations of the state in which such court has territorial jurisdiction.

In Equity. Demurrer to bill.

*John B. Henderson and Patrick & Frank*, for complainant.  
*Glover & Shepley*, for respondents.

MCCRARY, J. The claim sued on originated in the execution of two promissory notes by John J. Roe, one dated February 28, 1867, for \$65,000, and the other dated March 4, 1867, for \$35,000, payable on call and to himself. The fraud and breach of trust charged against said John J. Roe as a director of the National Bank of the State of Missouri, is alleged as having been committed on the fourteenth day of April, 1868, and consisted, as the bill avers, in certain entries upon the books of said bank made by said Roe, who was one of the directors, in collusion with the other directors of the bank. It is averred that said notes, and other similar notes given by other directors, had been discounted by the bank and were held by it as part of the assets, and that on the date last named entries were fraudulently made upon

the books of the bank showing payment thereof, though no part of said notes, or either of them, except interest up to that time, had been paid, and no payment thereon has been since made. This of course makes, if true, a clear case of indebtedness from said Roe to the bank. The indebtedness, according to these allegations, accrued as early as the fourteenth day of April, 1868. John J. Roe died on the fourteenth day of February, 1870. His estate was administered upon under the laws of Missouri, and this claim was not proven before the probate court. Said estate has been fully administered by the administrator, and the administration closed. Certain real and personal property left by the deceased having passed to the defendants herein, as his heirs, this suit is intended to subject the same to the payment of the plaintiff's demand, the bill for this purpose having been filed on the seventeenth day of June, 1879.

It will thus be seen that the cause of action accrued nearly two years before the death of John J. Roe, and more than 10 years prior to the bringing of this suit, and is therefore barred by the statute of limitations of Missouri, (if that statute is to be followed here,) unless the plaintiff has taken the case out of the statute by the allegations of his bill concerning the concealment of the alleged fraud and its discovery. Upon this point the bill alleges, in substance, that the fraud complained of was concealed by the directors of the bank, (said John J. Roe, up to the time of his death, being one of them,) in collusion with the cashier, whereby the said national bank, and its stockholders and creditors, were kept in ignorance of the facts until July 10, 1877, when the fraud was discovered by the complainant. It is further alleged that the claim here sued upon arises out of the breach of an express trust by the said John J. Roe and his associates, and for that reason said statute of limitations does not affect the complainant's right of recovery herein, and it is alleged generally "that, in consequence of said fraud, and the concealment thereof as aforesaid, the claim here sued upon is, in equity, excepted from the operation of the statute of limitations, in

order to prevent such statute from operating as a fraud upon said bank, and your orator, as receiver thereof."

I am of the opinion that there is a sufficient averment in the bill of a fraudulent concealment of the cause of action, and the question, therefore, is whether, notwithstanding such concealment, the defendants can successfully plead the statute of limitations.

The statute of Missouri concerning administration requires the presentation of all claims against an estate within two years from the time of the publication of a notice of the administration to creditors, and it declares that "all demands not thus exhibited within two years shall be forever barred." There is a saving clause in favor of infants, persons of unsound mind, persons imprisoned, and married women, but nothing is said as to cases of concealed fraud. 2 Wagner's St. 86, 102.

The general statute on the subject of the limitation of actions provides that, in an action for relief on the ground of fraud, the cause of action shall be deemed not to have accrued until the discovery of the fraud by the aggrieved party. 1 Wag. 747.

It is earnestly contended, on behalf of the respondents, that, according to the construction placed by the supreme court of Missouri upon these statutes, the action is barred, notwithstanding the discovery of the fraud within two years. Upon this subject counsel insist:

*First.* That the statute regulating the prosecution and collection of claims against an estate absolutely bars all demands not exhibited within two years, and that, since no exception is made by the statute itself in favor of demands growing out of concealed fraud, the court is not at liberty to engraft this exception upon the statute.

*Second.* That the general statute of limitations, which does contain a provision declaring that in actions on the ground of fraud the cause of action shall be deemed not to have accrued until discovery by the aggrieved party, does not apply to this case.

Upon the first proposition we are referred to *McKenzie v.*

*Hall, Adm'r*, 51 Mo. 303; *Richardson v. Harrison*, 36 Mo. 96; and, upon the second, to *Rogers v. Bronson*, 61 Mo. 187.

Without determining whether these authorities sustain the propositions stated, we turn to another inquiry, which necessarily requires prior consideration. Is it true that the courts of the United States are bound to follow, as rules of decision in equity cases, the statutes of limitation of the several states, and the construction given to them by the state judiciary? It is insisted that under the twenty-fourth section of the judiciary act (Rev. St. § 721) the statutes of limitation of the several states, where no special provision has been made by congress, form the rule of decision in the courts of the United States, and that the same effect is given to them as is given in the courts of the state. Such is undoubtedly the rule in cases at common law, and the statute, by its terms, applies to no other cases. I think it well settled that a federal court of equity is not bound by such statutes, and much less by the construction given to them by the state tribunals. In the exercise of the chancery jurisdiction conferred by the constitution and laws of the United States this court is not governed by the state practice. The supreme court has repeatedly decided that the rules governing the exercise of this jurisdiction are the same in all the states, and are according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law. The exercise of this jurisdiction is regulated by the act of 1792, (Rev. St. § 913,) which declares that the modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law. The rules of decision in equity cases in the federal courts are to be uniform, and in the exercise of their equity jurisdiction those courts are unaffected by state legislation. *Boyle v. Zachary*, 6 Pet. 658; *United States v. Howland*, 4 Wheat. 115; *Neves v. Scott*, 13 How. 271; *Noonan v. Lee*, 2 Black. 507; *Robinson v. Campbell*, 3 Wheat. 323.

The only question, therefore, is whether this court should, upon principle, adopt and follow the statute of limitations of Missouri as construed by the supreme court of that state.

If the interpretation given to the rulings of the supreme court of Missouri by the counsel for defendants is the true one, I do not hesitate to say that this court cannot follow those rulings. The statute, thus construed, would be in direct conflict with a well-settled rule of equity jurisprudence as understood and administered in the federal courts for many years. It would require this court to hold that, in a case where the demand happens to be against an estate, a party who has committed a fraud may consummate it beyond the possibility of remedy by concealing it. This seems to me to be a proposition that no court of equity can, with propriety, maintain, if left free, as this court is, to consider it upon the merits. In cases where the federal courts follow, in equity, the state statutes of limitation by analogy, they do so because equity requires it, and the statutes are found to be in harmony with its general principles.

The rule that the statute of limitations does not run in favor of one who perpetrates a fraud while he conceals it from the party injured, as a general doctrine of equity jurisprudence, is too well settled to require the citation of authorities.

The demurrer to the bill is overruled.

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UNITED STATES *v.* LOUP.

(*Circuit Court, E. D. Missouri.* April 3, 1880.)

INTERNAL REVENUE—POSSESSION OF PARTS OF STAMPS PREVIOUSLY USED ON SNUFF JARS—REV. ST. § 3376.—The possession of parts of internal revenue stamps which had been previously used upon snuff jars does not constitute an offence within the terms of section 3376 of the revised statutes, relating to the fraudulent possession of cancelled stamps, although the facts indicated a fraudulent purpose upon the part of the defendant.

Case certified up to the circuit court after trial and verdict in the district court

*William H. Bliss*, District Attorney, for the prosecution.

*John H. O'Neil*, for defendant.

TREAT, J. The question presented involves the construction of the United States statutes pertaining to internal revenue, and particularly section 3376. The defendant is charged in the indictment with having had in his possession internal revenue stamps that had been theretofore used and cancelled. It appears from the arguments and statements of counsel, rather than otherwise, that the facts are that defendant did have in his possession parts or halves of several stamps which had theretofore been used, which could readily be placed on a package in such a position as to give them the appearance of a complete stamp; but no complete, unbroken or un mutilated stamp.

Under the stipulation of counsel this court is asked to determine whether, on such a statement of facts, the defendant can be found guilty of the offence charged under section 3376.

Reference has been made to many other sections of the statute, supposed to be *in pari materia*; and, on the other hand, the rules of construction as to criminal statutes have been invoked. Where a statute containing many provisions as to distinct subjects, each of which has its own peculiar requirements, is presented for interpretation, the requirements and penalties of one cannot, in a criminal proceeding, be imported into another. Stamps, according to the law and regulations, are to be placed on packages of snuff in a prescribed manner, whereby the opening of the package will destroy the stamp. As to brewer stamps, the statute is very specific as to the mode of placing them on the packages and destroying them; and, as to stamps to be used for some other purposes, it is provided that they shall be "utterly" destroyed, etc.; yet as to snuff stamps no such requirement exists, because it is presumed that if attached as demanded they will necessarily be ruptured or torn into parts. The fact that more specific provisions are contained in the statutes as to other articles would indicate, not that such provisions should obtain as to snuff, but that snuff stamps were intended to follow a different rule—a rule specific as to them.

The statute has several provisions which will adequately



protect the government against fraud by manufacturers or dealers in snuff without importing into section 3376 words not there. It would have been very easy for congress to have enacted that the possession of any part of a stamp previously used should be punishable, if such had been the purpose; or it might have been enacted that the possession of parts which were capable of being united or reunited, etc., should be an offence. When the specific mode of using stamps for tobacco and snuff, as prescribed by the statutes and regulations thereunder, is considered, it is evident that section 3376 contemplated stamps detached as a whole, and not the mere possession of fragments of stamps, no matter how capable of being used.

If stamps previously used are again affixed to a package, or if not destroyed when the package is emptied, etc., the section provides for appropriate penalties. Why, then, should a court go beyond the terms of the section to declare that to be an offence, by construction, which the statute does not make an offence, especially when the same section makes punishable any failure to destroy the stamp on opening the package, or any affixing of the stamp to a new package?

The question must be resolved in favor of the defendant, although the facts stated indicate a fraudulent purpose on his part.

McCrary, J., concurs.

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AMERICAN UNION TELEGRAPH CO. v. BELL TELEPHONE CO.

(Circuit Court, E. D. Missouri. April 12, 1880.)

**MANDAMUS—JURISDICTION OF THE CIRCUIT COURTS.**—The jurisdiction of the circuit courts in *mandamus* proceedings is not enlarged by the act of 1875.

Motion for discharge of order to show cause why writ of *mandamus* should not issue.

Cline, Jamison & Day, for petitioner.

Edmund T. Allen, for respondent.

TREAT, J. To have the jurisdictional question tested, the order to show cause issued in this case; and now, on the motion to discharge said order, the court is to determine whether, by force of the act of 1875, the powers not theretofore existing as to an original proceeding for *mandamus* have been granted. All the decisions prior to that act, it is conceded, denied such jurisdiction in the United States circuit courts; but it is contended that the act of 1875 not only enlarged the jurisdiction as to parties, but also as to the subject-matter and forms or modes of proceeding. The language invoked is that said courts "shall have original cognizance, etc., of all suits of a civil nature at common law or in equity."

There still remain on the statute book sections 629 and 716, which are substantially a reproduction of sections 11 and 14 of the judiciary act, (1789,) unless their restrictions are repealed by the act of 1875. The latter enlarged the jurisdiction as to parties, but used the same language as to the nature of the suits which had prevailed since 1789, viz.: "All suits of a civil nature, at common law or in equity," under which the United States supreme court has uniformly held that, taken in connection with section 14 of the original act—now 716 of the Revised Statutes—the power claimed did not exist. It is held, therefore, that the United States circuit courts have not, under the statutes of 1875, any other jurisdiction in *mandamus* proceedings than theretofore existed. The same reasons that caused congress originally to withhold the authority exist more forcibly to-day, growing out of the large multiplication of offices and corporations.

The motion to discharge the order is granted.

If the parties wish to further test the question a demurrer to the jurisdiction may be interposed and sustained.

UNITED STATES *v.* LITTLE MIAMI, COLUMBUS & XENIA RAILROAD COMPANY.

(Circuit Court, S. D. Ohio. March, 1880.)

**INTERNAL REVENUE—ACT OF JUNE 30, 1864—ACTION TO RECOVER TAXES WITHOUT AN ASSESSMENT.**—An action of debt may be maintained to recover taxes without an assessment, where the statute describes the subject of the taxes and fixes the rates, so that the amount may be ascertained by evidence.

**SAME—ASSESSMENT MADE AND PAID—SUBSEQUENT SUIT FOR BALANCE BEYOND ASSESSMENT.**—An assessment and payment are not a bar to a suit for the recovery of an amount claimed to be due over and above the amount which has been thus assessed and paid.

**SAME—CORPORATION—STATUTE OF LIMITATIONS.**—The limitation of 15 months within which an assessment may be made has no application to an action against a corporation for taxes imposed by statute.

**RAILROAD CORPORATION—LEASE.**—The lease of a railroad does not dissolve such corporation, and it may still be sued for liabilities incurred prior to such lease.

**SAME—DEPRECIATION OF ASSETS—DEDUCTION FROM PROFITS.**—The depreciation of assets during a certain period cannot be deducted from profits earned during the same period, in determining the taxable profits of a railroad corporation under the act of June 30, 1864.

*Channing Richards*, District Attorney, for the United States.  
*Stanley Matthews*, for defendant.

**SWING, J.** This suit was brought by the United States to recover the tax of 5 per cent. imposed by the internal revenue act of June 30, 1864, upon profits earned from the first of July, 1864, to the first of December, 1869, and used in construction, or carried to the credit of certain funds. It was claimed by the United States that the defendant has earned profits which were so used during that period amounting to \$326,000, on which no tax was paid.

The defences were: *First*, that returns were made each year, and accepted by the government, upon which taxes were assessed and paid; that no assessment has been made for the additional amounts now claimed, and if there were errors and omissions in the returns they cannot now be corrected, nor can the taxes now be recovered without an assessment; *second*, that the defendant in fact paid taxes on all profits made

during the period in question, and that the profits shown by their books during that period, on which tax is claimed, are fully wiped out by certain items charged to profit and loss in 1869.

The court disposed of the first defence as follows: An action of debt may be maintained to recover taxes, without an assessment, where the statute describes the subject of the taxes and fixes the rates so that the amount may be ascertained by evidence. *Dollar Savings Bank v. U. S.* 19 Wall. 227; *King v. U. S.* 99 U. S. 229; *The U. S. v. S. J. Tilden*, 24 Int. Rev. Rec. 99. Nor will the fact that an assessment has been made and paid be a bar to a suit for the recovery of an amount claimed to be due over and above the amount which has been assessed and paid *U. S. v. Hazard*, 22 Int. Rev. Rec. 309; *U. S. v. S. J. Tilden*, 24 Int. Rev. Rec. 99.

The tax imposed by section 122 of the statute, although substantially a tax upon the stockholder, so far as its effects and results are concerned, yet the obligation to pay the tax, is by this section imposed upon the corporation, and this would seem to be the view entertained by the supreme court of the United States in the *Michigan Central R. Co. v. Slack, Collector*, 26 Int. Rev. Rec. 60.

This being an action against the corporation for taxes imposed by statute, and not upon an assessment for taxes, the limitation of 15 months within which an assessment may be made does not apply; and congress not having fixed a time within which an action of this character shall be brought, "no laches can be imputed to the government, and against it no time can run so as to bar its rights." *The U. S. v. Thompson*, 98 U. S. 486; *The U. S. v. Kirkpatrick*, 9 Wheat.; *The U. S. v. Williams*, 5 McLean, 133.

It is not necessary now to consider the effect of the lease by the defendant to the Pennsylvania Central & St. Louis Railway and the Pennsylvania Railroad Company further than to say that such lease did not dissolve the corporation, and it may still be sued for liabilities incurred prior to such lease. But whether the property can be subjected to the

satisfaction of a judgment obtained, and the mode of subjection, are questions not now before the court.

Upon the second defence the court held that a portion of the items charged to profit and loss in 1869 was properly chargeable to expenses and losses incurred in operating the road during the period named, and should be deducted from the amount of apparent profits shown by their current reports, thus reducing the sum to \$168,707.22, upon which the plaintiff was entitled to recover the tax of 5 per cent., amounting to \$8,435.36. The remaining items charged to profit and loss in 1869, being the estimated depreciation of assets during the period in question, the court held not to be properly chargeable to expenses, and could not be deducted from profits earned during the period, and used in construction or carried to the credit of any fund.

Exceptions were taken by the defendant, and the case will be carried to the supreme court.

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### FIRST NATIONAL BANK OF CINCINNATI *v.* BATES.

(*District Court, S. D. Ohio.* March, 1880.)

**WAREHOUSE RECEIPT—ASSIGNMENT—CONVERSION OF PROPERTY—ACTION BY ASSIGNEE.**—The assignment of a warehouse receipt transfers the legal title and constructive possession of the property to the assignee, and he may maintain an action for its conversion.

Trover, by the assignee of certain warehouse receipts, to recover for the wrongful conversion of the property.

The petition in this case states substantially that on or about the twenty-third day of December, A. D. 1876, one James B. Grant, being then indebted to the plaintiff in a large sum of money, and anticipating that he might thereafter desire to borrow other large sums of money from time to time of the plaintiff, upon such collateral securities as the said Grant might from time to time be able to furnish, did then and there agree with the plaintiff that any and all property that was left with the said bank as collateral, of what-

ever nature the same might be, whether it was personal chattels or bonds, bills, notes, securities, or choses in action of any kind, or any other property, might be held by said bank as a pledge and collateral to any indebtedness that might then and there exist between the said Grant and the said bank; that in pursuance of said agreement, and upon the faith of such securities as the said Grant agreed to furnish, the plaintiff, from time to time, discounted notes and bills for the said Grant, and loaned him money thereon; that on the twentieth of December, 1876, Grant was the owner of 150 tierces of lard, which he left in store with the defendant, and received from him a warehouse receipt therefor, as follows:

"CINCINNATI, December, 1876.

"Received in store, from James B. Grant, 150 tierces lard, prime steam lard, weighing this day fifty thousand two hundred and fifty pounds net, (50,250 lbs. net,) which are subject to his order upon the return of this warehouse receipt.

[Signed]

"H. M. BATES,

"Per G. BOGEN, Jr."

—And that said Grant, on or about the twenty-third day of December, A. D. 1876, pledged and delivered said warehouse receipt as colateral security to the plaintiff.

That the defendant kept in store large quantities of lard at his warehouse, and, from time to time, issued his warehouse receipts to those for whom he held the property in store; that from long and general usage in commerce and trade such warehouse receipts have now, and for a long time past have had, a well understood import among business men, and heretofore have been and are now extensively used in the city of Cincinnati as a common security in obtaining loans and discounts, and in other dealings with banks and bankers; and that the said warehouse receipt was issued by the defendant to the said Grant, that the same might be used by the said Grant as collateral security in his various business transactions; that the said Grant left the said warehouse receipt as security with the plaintiff, in pursuance of the agreement made with it on the twenty-third day of December, 1876;

that in pursuance of that arrangement said Grant became indebted to the bank for loans made to him by the bank in the sum of \$21,146; that he has failed, and refuses to pay the same, and that this sum exceeds the value of all securities left with the bank; that afterwards, under the same agreement and for the same purpose, he delivered to and pledged to the plaintiff the defendant's warehouse receipt for 100 tierces of lard; and that on the nineteenth day of January, 1877, under the same agreement, and for the same purpose, he delivered and pledged to the plaintiff the defendant's warehouse receipt for 50 tierces of lard; that the plaintiff tendered to the defendant the warehouse receipt, and demanded of him the delivery of the lard, which the defendant refused, and still refuses to deliver.

And the plaintiff prays judgment for \$9,000, with interest from the twenty-seventh day of September, 1877.

The defendant, by answer, denies:

1. That an agreement was made by the plaintiff with Grant, as alleged in the petition, and avers that such agreement, if made, was void.

2. That before any loan had been made upon the receipts the lard had been delivered in good faith to Grant, without notice that the plaintiff had any interest in it, and that said warehouse receipts had been canceled before they were pledged; denies that they were pledged as collaterals for loans or advances to be made, but were pledged for loans known as call loans long after the lard had been delivered to Grant.

Defendant denies that he had knowledge or notice of plaintiff holding said receipts until a second lard season came around; that he received and held the receipt an unreasonable length of time, and thereby deprived defendant from protecting himself before Grant became insolvent.

3. That they had been satisfied before plaintiff received them, and therefore no interest vested in them.

4. Denies the value of the lard as alleged, and says no offer to pay storage or charges was made.

5. Denies that Grant is indebted to the bank, and denies

that the indebtedness exceeds the value of the securities it holds; and alleges that but for the negligence of the bank, the securities held by the bank would have paid all Grant's indebtedness; that large amounts of illegal interest had been taken, which, if properly accounted for, would satisfy the debt of Grant to the bank, and he denies specifically the other allegations of the petition.

The plaintiff, by replication, denies the allegations of the answer.

The plaintiff asked for the following special charges:

1. We ask the court to instruct the jury that if the defendant received the 300 tierces of lard from James B. Grant into his warehouse, and gave him the three warehouse receipts set out in the petition, and while the said lard was so stored in the said warehouse, the said Grant indorsed the said warehouse receipts, delivered and pledged them to plaintiff, under the paper in evidence called a general collateral, dated December 23, 1876, for money then borrowed, or then due, and as a basis of continued debt, or of continued or future loans, and the plaintiff in good faith, relying upon such pledge, subsequently loaned or continued the loans upon the faith of such warehouse receipts as a security, and which loans are now due and owing the bank, then the lard named in such receipts, from the time of such pledge and indorsement, became the property of the plaintiff to the extent of such indebtedness; and if the defendant afterwards gave the said lard to Grant, or to any one else, without the return of said warehouse receipts, and without the consent or knowledge of the plaintiff, whereby it has been lost to the plaintiff, then the defendant is liable in this action to the plaintiff for the value of said lard at the time of its delivery to said Grant and loss to the plaintiff, and the jury may add to such sum as damages a sum equal to 6 per cent. thereon. Given.

2. If the bank loaned money to Grant and received the warehouse receipts in question from him as a security for such loan, while the lard was in the defendant's warehouse, under the paper called the general collateral, then these  
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receipts are valid in the hands of the bank for such money loaned. Given.

3. That if the defendant gave the warehouse receipts set out in the petition to said Grant for lard left by him in defendant's warehouse, and after the same were *bona fide* pledged by said Grant to the plaintiff, as above set out, for loans of money or the continuance of such loans made upon receipts, delivered the lard back to said Grant without the warehouse receipts, and without the knowledge or consent of the plaintiff, then the plaintiff would be entitled to recover of the defendant the value of the lard named in such warehouse receipts as aforesaid, provided the indebtedness of said Grant to the plaintiff, for which such pledge was made, was equal to such value. Given.

4. If the plaintiff and defendant have both suffered by the fraud of James B. Grant, by the defendant leaving the warehouse receipts in question outstanding, and the delivery to him of the lard without the said warehouse receipts, and by the use of said receipts by said Grant, in the ordinary course of business, as a means of credit with the plaintiff, then the defendant must bear the loss. Given.

5. If the defendant, Bates, adopted a mode of doing business with Grant by which he gave him warehouse receipts like these in question, and delivered the property without inquiry for or having the receipts returned to him, and did so in this case while the bank held them as collateral for loans made and now due, such a course of business could not be set up as a defence to this action, if the bank had no knowledge of it, or that the property was delivered up to Grant, or would be, and did not assent to it in any way. Given.

6. Even should it be shown in this case that the proceeds of the lard in question was deposited in the bank by Grant in his bank account, upon which he was daily drawing, that such fact would be no defence to this action unless the bank had notice or knew that the money so deposited was the proceeds of the lard, or that Grant had received the lard from Mr. Bates. Given.

7. That the paper called general collateral contemplates future loans and indebtedness, and covers future collateral that may fall under it, where the loan was under such general collateral. Given.

8. That to transfer the title to property held by a warehouseman, and for which he has given a regular warehouse receipt, to a party as collateral security for a loan, by indorsement and delivery of the warehouse receipt, it is not necessary that the party receiving the receipt as such collateral shall give notice of the assignment of such receipt to him. Given.

9. That if said Bates and said Bogen were carrying on the pork business together under the name of said Bates, each to have one-half the profits thereof, and the said Bates left the entire management and control of the said business to said Bogen, he, said Bates, cannot plead ignorance of anything relating to the business, or the usual modes of conducting it, or in reference to warehouse receipts used in conducting said business, which was known to the said Bogen. Given.

The defendant asked for the following special charges:

1. The warehouse receipts of Bates, copied into the petition, were not negotiable, so that their indorsement and delivery by Grant to the bank vested a right of action therein in the bank against Bates for the lard or the value thereof.

Refused, as written; given as follows: "It did not vest a right of action as upon a negotiable note or bill of exchange, but it did vest in the bank a right to maintain an action for injury to, or conversion of, or for a recovery of, the property."

2. The indorsement and delivery of said warehouse receipts by Grant to the bank created no privity of contract between them which prevented Bates from delivering said lard to Grant unless said Bates had notice of said transfer to the bank. Refused.

3. The only effect of said indorsement and delivery of the warehouse receipts by Grant to the bank was to transfer to said bank the title to said lard and the right to its possession, and to constitute said Bates the bailee of said bank, when notified of said transfer to the bank. Refused.

4. The stipulation of said warehouse receipts that said lard is subject to the order of Grant on the return of said receipts, is personal between said Bates and Grant, and said Bates could waive their return unless he had notice of their transfer to the bank. Refused.

5. If said First National Bank and the warehouse and place of business of said Bates were in Cincinnati, and the same was known to the representative officers of said bank, and they did not, within a reasonable time after said receipts were transferred to the bank, notify said Bates of said transfer, then said bank was guilty of negligence, and said Bates was not bound to keep said lard, but was justified in delivering it to said Grant. Refused.

6. It is for the jury to determine what is reasonable notice, in view of all the circumstances, and the situation and relation of the parties to each other. Refused.

7. If said bank delayed for six months to notify said Bates of the transfer of said receipts to said bank, knowing that said Bates had his place of business in Cincinnati, such delay was unreasonable, and said Bates cannot be sued for said lard or its value. Refused.

8. If the representative officers of said bank knew, while the bank held said receipts, that said Grant was from time to time obtaining said lard in parcels from said Bates, and did not object, then said bank cannot complain if said Bates delivered all said lard to said Grant. Refused.

9. If said bank officers had good reason to believe, from the course of business of said Grant with said Bates, that said Grant was obtaining said lard in parcels from time to time, while it held said receipts, it was their duty to have inquired about it, and to have notified said Bates, and their failure to do so exonerates said Bates from all liability. Refused.

10. If the custom of pledging such warehouse receipts as collateral upon which to raise money was not known among warehousemen, and said Bates had not notice of any such custom, then he is not bound by it, and it did not prevent said Bates delivering said lard to said Grant, and the trans-

fer of such receipts to the bank was not binding on said Bates. Refused.

11. If you find that at the time the four notes were given making up the \$21,146 claim set up in the petition—of \$7,000, dated August 14, 1877; of \$9,000, dated August 16, 1877; of \$1,500, dated September 4, 1877; and of \$1,500, dated September 6, 1877: \$19,500—that all of the lard covered by the warehouse receipts copied into the petition had been surrendered to Grant, so that by that time there was none of said lard in Bates' possession, then said pledge in said notes of "general collaterals" did not transfer said lard to said bank. Refused.

12. If the bank claims the collaterals under the four notes dated in August and September, 1877, about eight months after they were issued, it was the duty of the bank to have first inquired to ascertain if Bates was in Cincinnati, accessible to them. The lapse of time was such as to put the bank on inquiry about the lard before they could hold Bates responsible. Refused, as written; given as follows: "If these loans were made at the date of the last notes; if they were the original loans of that date, and Grant had then presented the bank with these collaterals, which had been given some eight months before that date; it was the duty of the bank to make inquiry in regard to them before taking them as collateral security. If, however, they were renewals of original notes, and the receipts had been pledged as collaterals to the original notes, the renewals would carry the pledges with them to the last note of such renewals."

*Lincoln, Stephens & Slatterly*, for plaintiff.

*I. A. Jordan and Jordan, Jordan & Williams*, for defendants.

SWING, J., (*charging jury*.) Upon a demurrer to the evidence we have already determined that this action is in the nature of an action of trover, to recover for a wrongful conversion of the property described in the warehouse receipts. It is therefore unnecessary to determine the negotiable properties of warehouse receipts. We may remark, however, that in the commercial sense of the term they are not negotiable

instruments. But it is the well settled law that they are assignable.

In this view we are required to ascertain, therefore, what rights of property and possession vested in the assignee by the assignment of these warehouse receipts; but in doing this we shall not attempt a review of the numerous authorities cited by learned counsel, or perhaps the more difficult task of reconciling them, as the supreme court of the United States, in *Gibson v. Stevens*, 3 How. 399, has declared the law upon this subject, and by this we are governed.

In that case McQueen & McKay had purchased of certain parties a quantity of pork and flour, which was then in the warehouse of the vendors, and had taken from them a written memorandum of the sale, with a receipt for the money, and an engagement to deliver it in canal boats soon after the opening of canal navigation.

There was also a written guaranty that the articles should bear inspection. Afterwards McQueen & McKay, in consideration of advancements made to them by a commission merchant, indorsed and delivered these papers to the merchant, and the question determined by the court was the legal effect of such indorsement and delivery.

Chief Justice Taney, in delivering the opinion of the court, says: "In the opinion of the court it transferred to him the legal title and constructive possession of the property; and the warehouseman, from the time of this transfer, became his bailee, and held the pork and flour for him; the delivery of the evidence of title and the orders indorsed upon them was equivalent to the delivery of the property itself."

The principle of that case applies to the assignment and delivery of warehouse receipts, and was so recognized by Judge Dillon in *Harris v. Bradley*, 2 Dillon, 285, and by Justice Miller, of the supreme court, in *McNeil v. Hill*, 1 Woolworth, 96.

The legal title and constructive possession of the property being vested in the assignee of the warehouse receipts, he has the right to maintain an action for its conversion.

If, therefore, the jury shall find from the evidence in the case that the warehouse receipts in controversy were assigned and delivered by Grant to the plaintiff in pledge as collateral security for any general indebtedness which then or might thereafter exist from Grant to the plaintiff, and said Grant was then indebted, or afterwards became indebted, upon the faith and credit of these papers to the plaintiff, and such indebtedness remains unpaid, and the defendant, without the knowledge and consent of the plaintiff, surrendered the lard to Grant, the plaintiff will be entitled to your verdict for the value of the property, not exceeding the amount of the indebtedness by Grant to the bank, and to this the jury may add a sum equal to 6 per cent. interest to the first day of the term.

The defendant, having delivered to Grant these receipts, placed it in his power to treat with the plaintiff upon the faith of them, and his statement in them that the lard was to be delivered upon the order of Grant, upon the return of the receipts, was a representation upon which the plaintiff had a right to rely; and if, without the return of such receipts, he delivered this lard to Grant, it will not protect him in this case.

If the jury find from the evidence in the case that all of the warehouse receipts in controversy were not pledged as general collaterals for general indebtedness of Grant to the plaintiff, but were pledged as special collaterals to secure specific loans, and the loans for which they were pledged have all been paid, then your verdict will be in favor of the defendant; or, if a portion of them were so specifically pledged, the plaintiff would not be entitled to a recovery for those so pledged.

Verdict for plaintiff in the sum of \$8,955.20.

MASON v. THE LAKE ERIE, EVANSVILLE & SOUTH-WESTERN  
RAILWAY COMPANY.

(Circuit Court, D. Indiana. January 23, 1880.)

WABASH & ERIE CANAL—TOW-PATH—ABSOLUTE TITLE OF STATE—  
CONVEYANCE TO TRUSTEES—ABANDONMENT.—The state of Indiana,  
under various acts of the legislature, acquired the absolute title to the  
tow-path of the Wabash & Erie Canal, and the mere fact that the land  
ceased to be used for that purpose did not re-vest the same in the orig-  
inal owners, where the property in controversy had been transferred to  
trustees for the benefit of creditors of the state.

DRUMMOND, J. Under various acts of the legislature of this  
state there had been constructed and operated, prior to 1847,  
a canal called the Wabash & Erie Canal, extending from  
Evansville, on the Ohio river, to Toledo, on Lake Erie. The  
state became very much embarrassed, and owed to many per-  
sons debts incurred for moneys advanced for the construction  
of the canal, and, by virtue of different statutes, on the thirty-  
first of July, 1847, conveyed the canal, with all its appendages,  
to the board of trustees of the Wabash & Erie Canal, for  
the benefit of the creditors of the state. The creditors, by  
virtue of a decree of this court of December 24, 1875, sought  
to enforce their rights against the property conveyed to the  
trustees, and under its order the property was sold in differ-  
ent parcels. Under the sale, Dukes, the petitioner in this  
case, became the purchaser of all that portion of the canal  
and its appendages in Vanderburgh and Warrick counties,  
except what was within the territorial limits of the city of  
Evansville, for the sum of \$3,250.

In 1872, while the conveyance of 1847 was thus operating  
upon the canal and its appendages, the defendant railway  
company took possession of about nine and one-third miles  
of the tow-path of the canal, being a portion of that purchased  
by the petitioner, and constructed its railroad upon that part.  
So far as we know, from the records of this case, this was  
done by the railway company without any authority from the  
state, or from the board of trustees, nor was it by virtue of  
any proceeding under any law of the state. The railway com-

pany made a mortgage on its property to secure certain indebtedness due to various of its creditors, and at the November term, 1876, of this court, the plaintiffs in this case filed a bill to foreclose this mortgage, and on the fifteenth day of June, 1877, this court rendered a decree of foreclosure, and the railway and its property were directed to be sold, and they were accordingly sold on the thirty-first day of October, 1877.

The petition of Dukes, filed June 14, 1877, assumes that the railroad was constructed on the land described while it was the property of the state, or rather, perhaps, of the trustees to whom it had been transferred by the state; the state, at the time the transfer was made, having, it is insisted by the petitioner, an absolute, indefeasible title in the land on which the railway was constructed. The intervening petition of Dukes was referred to the master to determine whether there should be anything paid to the petitioner for any interest which he had in the land, and, if so, what sum. The master took evidence in the case and found, and has so reported, that the petitioner was the owner, under his purchase, of the land in controversy, of which the railway had taken possession, and that he was entitled to the sum of \$16,800, as a reasonable compensation for the value of the property. The result of this report of the master is that he was of the opinion that no right was lost by the owner of the canal property in consequence of the action of the railway company, or of the non-action of the state, or of the trustees, or because of the delay on the part of the latter to interfere with the possession of the railway company.

Various questions have been argued on exceptions taken to the report of the master. The material ones are whether Dukes bought any title to this part of the canal, and, if so, what damages ought to be paid to him as compensation for the land occupied by the railway company. As connected with this, it becomes necessary to determine whether, under the various laws of the state, it acquired an absolute title to the property in controversy, or whether it had the mere use as long as the canal existed as such; for it is admitted that, long before the rights of the creditors were sought to be en-



forced by the decree of this court in the sale of the canal and its appendages, it had been abandoned as such, and had ceased to be used for several years.

As the case originally stood I had some difficulty in sustaining any equity which the petitioner might have, in consequence of the particular situation of the property at the time it was taken possession of by the railway company, and because of the purchase made many years afterwards by the petitioner; but I think that difficulty has been obviated by a stipulation made between all the parties to the controversy, in which it is agreed that the railway company, being in possession of the property, and the petitioner only claiming compensation for what may be his interest, he shall make an absolute conveyance to the railway company of all his interest, upon the payment of such sum as shall be ultimately decided by this court or by the supreme court of the United States.

I think I must hold in this case, and so affirm the ruling of the master, that in view of all the legislation on the subject by this state, and the later decisions of the supreme court of the state thereon, the state acquired an absolute title to the property in controversy in this case. *The Water-Works Co. v. Burkhardt*, 31 Ind. 364; *Fleming v. Nelson*, 56 Ind. 310. This is not like the case of *Kennedy v. City of Indianapolis*, decided in this court in March, 1878. In that case the canal had never been completed or operated as a canal, and it was through a public street of the town that the canal was intended to be constructed. It was, therefore, a case of an attempt to construct a canal which was abandoned before completion. It was a case where the right to land, if any existed, was abandoned before use. In this case it is different. The land for the canal throughout its whole length, so far as this case is concerned, was taken. The canal was constructed and operated for many years. There was thus acquired by the state the title to the land occupied by the canal, and its necessary appendages, and because the canal, after being used for a series of years, was abandoned, and the land ceased to be occupied as a canal, it did not cease to be the property of the state. This was one of the great systems

of internal improvement devised and executed in pursuance of the legislation of the state; and the state, having incurred debts through its construction and operation, had transferred whatever interest it had to trustees, for the benefit of its creditors, and therefore there existed in the creditors whatever interest the state had in the canal, and the lands which had been used for canal purposes; and, at the time the railway company took possession of the land in controversy, the contract made for the benefit of the creditors was still binding upon the property.

I must assume, I think, also, that the original owners of the land used for the purposes of the canal had become absolutely divested in favor of the state of all interest whatever in their property, and that the fact that the land ceased to be used for a canal did not re-invest the property in them. This being so, it follows that the foreclosure and sale of the property covered by the deed of trust, which was given by the state for the benefit of the creditors of the canal, clothed the purchaser at that sale and the petitioner in this case with the title to the property in controversy; and that he could recover possession of the same by proper legal proceedings in any court having jurisdiction of the case and of the property in controversy, the railway company having acquired no title to the same. The exceptions, therefore, to this part of the master's report must necessarily be overruled.

The next question is whether the master has allowed a proper amount as compensation to the petitioner for the interest which he acquired by virtue of his purchase of the property. The master felt great embarrassment, which is shared by the court, in determining this question, because the testimony upon the subject is very voluminous and conflicting, and it would be impossible to say, from the examination of the testimony, what is the true value of the property beyond all cavil or doubt. I have concluded, on the whole, to make a reduction from the amount allowed by the master in his report. It is true that the price of property obtained at a sale under legal proceedings is not always a true test of its value, and yet, in view of the great conflict of evidence in

this case, it seems to me impossible to be uninfluenced by the price which the petitioner gave for more property than is in controversy in this case. That price was only \$3,250. The sale to the petitioner was a public sale, after ample advertisement. It is difficult, of course, to lay down any absolute rule, even as to the reduction of the amount allowed by the master. We must necessarily generalize, to a greater or less extent, in considering a question of this kind under the character of the evidence. On the whole, I have come to the conclusion that I shall reduce the amount allowed by the master to the sum of \$10,000, and for that amount a decree will be allowed to the petitioner, which the owners of the railway will be required to pay upon the execution of a deed by the petitioner to them.

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**WRIGHT and others v. THOMAS and others.**

*(Circuit Court, D. Indiana. January, 1880.)*

**ASSIGNMENT FOR BENEFIT OF CREDITORS—INDIANA STATUTES CONSTRUED.**

Under the statutes of Indiana an assignment for the benefit of creditors is not void, (1) because the assignees did not make oath that the indentures and schedules required by the law contained a statement of all the property belonging to them, and did not make oath to other facts named in the statute; (2) because the trustees, before entering upon their trust, did not make oath that they would faithfully execute the same, together with other things named in the statute; (3) because the assignees reserved in the deed the right to instruct the trustees as to their duties; (4) because they reserved the right, with the consent of two-thirds in value of their creditors, to remove one or all of the trustees; (5) because they authorized the trustees to sell the property on credit, or in any other manner that might seem for the best interest of all the creditors.

DRUMMOND, J. This was a bill filed by the assignees in bankruptcy of Ebenezer Nutting, Frank Wright and Francis N. Randolph, partners, under the style of E. Nutting & Co., to determine the right and title to certain property formerly owned by the bankrupts, and also to enjoin certain creditors of the bankrupts from prosecuting suits to enforce liens claimed

by virtue of judgments obtained against them. A demurrer was interposed to the bill, which was sustained, and the bill dismissed, from which decree the plaintiffs took an appeal to this court.

The principal facts alleged in the bill, and upon which the controversy must turn, are these: E. Nutting & Co., on the twentieth day of July, 1875, being in straightened circumstances, conveyed all their property to certain persons in trust for the benefit of all their creditors equally. This conveyance was made under the act of the general assembly of this state, which provided for the voluntary assignment of personal and real property in trust for the benefit of creditors, and regulated the mode of administering the same. The grantees in this deed accepted the trust, and, submitting the matter to the Marion civil circuit court, assumed the execution of the trust under the order and jurisdiction of that court.

This deed of trust was duly recorded in the several counties in which the property assigned was situated. After this took place, and before the commencement of proceedings in bankruptcy, various creditors of E. Nutting & Co. instituted suits and recovered judgments against them in several courts, which judgments, if the deed of trust before referred to is invalid, became a lien on the real property of the bankrupts. In January, 1876, E. Nutting & Co. were adjudicated bankrupts by the district court of the United States for this district, and the plaintiffs became, by virtue of the proper proceedings in bankruptcy, the assignees of the bankrupts, and by operation of law became vested with all the property of the bankrupts. After this action of the district court the Marion civil circuit court made an order directing the trustees in the deed of trust before mentioned to convey all the property of the bankrupts to the assignees in bankruptcy, who, this being done, took possession of the property, and ever since have held the same.

Among other suits that have been commenced in the circuit court of the state was one by some of the judgment creditors to set aside the deed of trust on the ground that it was fraudulent and void under the law of the state; and the bill

now under consideration alleges that it is claimed on the part of the creditors that the deed of trust of the twentieth of July, 1875, is fraudulent and void for various reasons—*First*, because the bankrupts did not make the oath that the indentures and schedules required by the law contained a statement of all the property belonging to them, and because they did not make oath to other facts named in the statute; *second*, because the trustees, before entering upon their trust, did not make oath that they would faithfully execute the same, together with other things named in the statute; *third*, because the bankrupts reserved in the deed of trust the right to instruct the trustees as to their duties; *fourth*, because they reserved the right, with the consent of two-thirds in value of their creditors, to remove one or all of the trustees; *fifth*, because they authorized the trustee to sell the property on credit, or in any other manner that might seem for the best interests of all the creditors.

The general question in the case is whether the assignment made by the bankrupts in trust for the benefit of all their creditors was valid, or whether, on account of any or all the reasons named in the bill or presented in the argument on the demurrer by the defendants, it is fraudulent and void. Independent of the bankrupt law of the United States, there can be no doubt that it was competent for the bankrupts to make such an assignment as that named in the bill. Being insolvent, it was the most equitable distribution that could be made of their property to divide it equally among all their creditors. Then, unless the assignment was rendered invalid by virtue of the bankrupt law of the United States or of the provisions of the state law already referred to, it must be considered a valid assignment. If it was inoperative, by virtue of the bankrupt law, then the property, being all in the possession of the assignees in bankruptcy, the object of the bankrupt law is accomplished, and it is ready for distribution to the creditors of the bankrupts according to the terms of that law; and so there could be no objection to the bill on the ground that the assignment was invalid under the operation of a bankrupt law.

We proceed to consider whether it was invalid under the law of the state. Unless there was something in the law of the state which declared either expressly or by necessary implication that the assignment was invalid, then it must stand. The law of the state is "that any debtor or debtors in embarrassed or failing circumstances may make a general assignment of all his or their property in trust for all his or their *bona fide* creditors." What is the meaning of the words "make a general assignment?" The second section of the act declares the assignment must be made by indenture, duly signed and acknowledged before some person duly authorized to take the acknowledgment of deeds. "The indenture of assignment shall contain a full description of all the real estate assigned." This is all the language there is in the statute as to making the assignment which the first section says the failing debtor may do. These are undoubtedly essential elements in the making of the assignment: It must be by deed; it must be duly signed and acknowledged before some person duly authorized to take the acknowledgment; and if there is real estate to convey, then it must be described. That being so, we are prepared to consider the effect of the last clause of the first section of the statute, which is: "All assignments hereafter made by such person or persons for such purposes, except as provided for in this act, shall be deemed fraudulent and void." This simply refers to the making of the assignment. It does not declare that if some things are not done which are afterwards required to be done, by the assignor or by the trustee in the deed of assignment, that it shall be fraudulent and void.

For example, the second section of the act provides that within 10 days after the execution of the deed of assignment it shall be filed with the recorder of the county in which the assignor resides, whose duty it shall be to record the same. And it is then declared that until the assignment is recorded it shall not convey any interest in the property so assigned. Now, here is an unmistakable condition precedent to the assignment taking effect. It is not so in relation to many other matters which are required to be done. In the same

section it is declared that the assignor shall make oath, before some person authorized to administer oaths, in relation to some facts, and that the assignment shall be accompanied with a schedule containing a particular description of the personal property assigned. The making of the oath and the schedule of the personal property thus required are clearly no part of the assignment itself. They do not constitute any part of the making of the assignment. It is true that the statute declares that the schedule shall accompany the assignment, but the supreme court of this state has held that it constitutes no part of the assignment. *Black v. Weathers*, 26 Ind. 242. And, if the schedule is no part of the assignment, it is difficult to understand how the oath which is to be taken is a part of the assignment, especially when the statute requires that the schedule shall accompany the assignment, and makes no such requisition in direct terms as to the oath. It seems to me that the true meaning of the last clause of the first section of the statute is that it is to be confined, when it declares that all assignments made, except as provided for in the act, shall be deemed fraudulent and void, to that which by the terms of the act constitutes the making of the assignment, or indenture, as the statute calls it.

There are other sections which require certain things to be done by the person to whom the property has been assigned, and who holds it in trust for the benefit of all the creditors. It seems clear that an omission on the part of the trustee to perform his duty in respect to any act required of him by the statute cannot render the assignment itself fraudulent and void, because the legislature provides that if the trustee fails to comply with the provisions of certain portions of the law other disposition shall be made of the property by the appointment of a more competent and faithful trustee. There does not seem to be any other clause in the law, except that which is contained in the latter part of the first section, which declares under what circumstances the assignment shall be fraudulent and void. Undoubtedly it was competent for the legislature to provide, if in any respect where a demand was made by the law it was not complied with, that the assign-

ment should thereby become inoperative and void. It has not seen fit so to declare, and I do not think that in the absence of such a declaration this court can declare that it is fraudulent and void, unless the assignment is not made in the way required by the statute.

Some language used in the opinion of the court in the case already referred to is significant: "The intent of the act is to secure an equitable distribution of a debtor's estate, and to prevent one creditor from obtaining undue advantage over others. When, therefore, the instrument upon its face conforms to the requirements of the act, and a substantial compliance has also been made by the trustee, this court should not, by technical construction of the language of the law, defeat the evident legislative purpose." There is nothing in the case of *Brown v. Foster*, 2 Met. 152; *Hardeman v. Brown*, 39 N. Y. 196, or of *Britton v. Lorenz*, 45 N. Y. 51, inconsistent with this view. Some of the objections which are made to the deed of trust, as, for example, a certain right reserved by the assignor to give instructions to the trustee, and sell the property on credit, do not, I think, in a case like this, constitute badges of fraud *per se*, so as to render the assignment void; but, as the statute entrusts a court with the administration by the trustee of the estate, and it is entirely under its direction, undoubtedly the court would have power over any such provisions as these in the deed of assignment, so as to prevent them from operating to the prejudice of any of the creditors. The main controversy, as it seems to me, must depend upon this: Whether or not the assignors had, in good faith, assigned all their property, real and personal, for the benefit of all their creditors. That was the kind of assignment that the statute declared should be made, and that was the kind of assignment which the second clause of the first section declared, if not made, was fraudulent and void.

The result is that the decree of the district court, sustaining the demurrer and dismissing the bill, must be reversed.



**McMILLAN and others v. REES and others.**

(Circuit Court, W. D. Pennsylvania. March 22, 1880.)

**TWO PATENTS FOR SAME INVENTION.**—Of two patents for the same invention the one last granted is void, although it may have been first applied for.

**SAME—HOW IDENTITY OF INVENTION IS DETERMINED.**—Whether two patents cover the same invention must be determined by the tenor and scope of their claims, not by the description in the specifications.

**SEPARATE PATENTS FOR SEVERABLE PARTS OF SAME INVENTION.**—Separate patents for severable parts of the same invention may be patented, although the whole invention is fully described in each of them, to explain the purpose and mode of operation of the parts covered by the claims in such patents.

**COMBINATION OF PATENTED DEVICE WITH OTHER DEVICES.**—The connection or combination of a patented device or improvement with other devices may be the subject of a valid subsequent patent.

**In Equity.**

*Bakewell & Kerr*, for complainants.

*Rowland Cox*, for respondents.

McKENNAN, J. In *McMillan v. Barclay* the patent upon which the present bill is founded was contested upon various grounds, all of which were fully considered by the court, and a decree was rendered in favor of the complainant. No question is now made touching any of the specific defences set up in that case, but the patent is assailed for a reason not before suggested. It is urged that the patent, No. 63,917, set up in this case, is a duplicate of patent 52,730, granted to the same persons and for the same invention.

On the twenty-third of July, 1855, the patent involved in this case was applied for, and was disallowed by the commissioner of patents on the twenty-fifth of August, 1866. After repeated efforts to obtain a rehearing, in the early part of 1867, the applicant amended his specification, and again pressed his application for consideration.

This amendment consisted in a modification of the claim, the body of the specification and the drawings remaining unchanged. A re-examination was finally made, and a patent granted on the sixteenth of April, 1867. This patent is for "an improved application of steam power to the capstans of

vessels," and the claim is for "rotating a capstan placed on deck of a boat by means of an auxiliary engine, when said engine and capstan are placed forward of the steam boilers of said boat, substantially as herein before described, and for the purposes set forth."

Without having amended the application for this patent, the complainant McMillan, on the twenty-fifth of April, 1865, filed an application for a patent for a "mode for working a capstan by steam," which was allowed and issued February 20, 1866, numbered 52,730. The claim in this patent is for "the arrangement of the wheel *l, m, n, o, k, j, i, h, e*, and *d*; shafts 6, 5, 4, 3 and B; capstan barrel *p*; heads *q* and *r*, and pins Q; the whole being constructed, arranged and operated substantially as herein before described, and for the purpose set forth."

Are these patents, then, for the same invention?

1. In *McMillan v. Barclay*, 5 Fisher, 189, the import of the claim of the patent of 1867 was held to be "operating the capstan of a steamboat by certain mechanical means, actuated by steam derived from an auxiliary engine, where both the engine and the capstan are stationed on the deck of the boat forward of the steam boilers. The mere effect indicated is not claimed, for that would be clearly unallowable, but it is this effect produced by means substantially as described and employed under the conditions stated." In other words, it is for a *method* of producing a useful result to be practiced by the use of mechanism described in the specification, under conditions therein prescribed.

2. The claim of the patent of 1866 is for an arrangement or combination of specific devices, which embraces only some of the devices described in the patent of 1867, and adds others which are not therein described. The specification contemplates the use of this combination in practicing the *method* described in the patent of 1867, and it is treated and described throughout as an improvement in the arrangement and combination of the mechanical appliances by which that method is to be effectuated by securing new and better re-

sults. The claim is limited to a specific mechanical combination, and hence the patent can have no broader scope.

3. In the astute and able argument of the respondents' counsel the claim of the patent of 1867 is erroneously assumed to cover every means of accomplishing the proposed result. So broad a definition of it must certainly be discarded, for reasons fully discussed in *O'Reilly v. Morse*. As already stated, it is for a method of producing a certain result by means of mechanism described in the specification, under certain essential conditions. The mechanical agencies required to transmit the power of the auxiliary engine to the capstan are component parts of the method, and it cannot therefore be said that the use of connecting mechanism substantially different from that described in the specification would be an infringement of the patent of 1867. The same result may be produced if different means to that end are employed, without invading the patented method. Hence it is only the mechanical instrumentalities described and referred to in the claim, and those merely colorably different from them, which are within the protection of the patent.

4. The patent of 1866 is clearly for a combination of mechanical elements indicated in the claim, arranged and operating as described. The claim does not embrace all the mechanical devices described as constituents of the method covered by the patent of 1867, and it includes others not described in the latter patent. In a mechanical or a patentable sense, then, the two patents do not cover the same invention.

5. But conceding that the invention claimed in the patent of 1866 is within the scope of the patent of 1867 as one of the means adapted and intended to be used in effectuating the method claimed in that patent, is the patent of 1867, therefore, void?

The scope of a patent must be determined by its claims, and it does not necessarily cover all the descriptive matter in the specification. The effect of the specification is to describe the invention claimed in such full, clear, and exact terms that any one skilled in the art to which it appertains can

make and use it, and thus that it may be available to the public after the expiration of the patent. Where the invention consists of a mechanical combination, it is not only proper, but requisite, to describe the construction and arrangement of its component parts, the purpose for which it is to be used, the mode of its operation, and its relations to other mechanism with which it is intended to co-operate. This mechanism may be indispensable to the operativeness of the combination, but it does not constitute a part of the invention unless it is embodied in the claim. In *Forbush v. Cook*, 2 Fisher, 669, Mr. Justice Curtis says: "If inclined wires are necessary to the action of the combination specified, so are many other parts of the machine; and all parts necessary to the action and combination specified might be said to enter into the mode of combining and arranging the elements of the combination, but need not be, and ought not to be, included in the combination claimed."

Can there be any doubt, then, that any one might lawfully practice the method of rotating a capstan described in the patent of 1866, simply substituting other mechanism for the combination therein claimed, or what is the same thing, forming a new combination, by discarding some of the elements of the patented one? And why? Because only the combination claimed, and not the integral method described, is covered by the patent.

With this limitation of the scope of the patent of 1866, might not a valid patent be subsequently granted as that of 1867, for an integral method, of which the invention claimed in the first patent is one of the elements? I know of no sufficient reason why this may not be. The patents are incompatible. In a patentable sense their subjects are different, and hence they do not cover the same invention. It is well settled that a mechanical device, adapted and intended to be used in combined connection with other devices, may be patented by itself, and that the combination of which it is a constituent part may also be separately patented. For what reason? Because both patents do not cover the same invention.

Upon the same principle, if the complainant had built an engine of novel construction, describing it as specially fitted and intended for use in his method of rotating a capstan, he might patent it alone, and he might also obtain a patent for his method as a whole, describing his previously patented engine as one of its component parts. I am, therefore, of opinion that the patent of 1867 is not invalidated by reason of anything contained in the patent of 1866.

6. These views are not impugned by the cases referred to in the argument, as I understand them. A brief reference to two of them, as representing the whole class to which they belong, will sufficiently illustrate this. The fundamental principle of all these cases is that two patents for the same invention cannot co-exist; and that where two are issued to the same person the last one is void.

In *O'Reilly v. Morse*, 15 How. 63, the order of the patents in this case is inverted. Morse had obtained a patent broadly covering his own invention. He afterwards obtained a patent for a new arrangement or combination of the telegraphic mechanism by which the electro-galvanic current might be passed along the whole line without interruption by the local circuits. The court held the latter patent to be valid, saying: "Nor can its validity be impeached upon the ground that it is an improvement upon a former invention, for which the patentee had himself already obtained a patent. It is true that under the act of 1836, § 13, it was in the power of Professor Morse, if he desired it, to annex this improvement to his former specification, so as to make it from that time a part of the original patent. \* \* Nor is he bound in his new patent to refer specially to his former one. All that the law requires of him is that he shall not claim as new what was covered by a former invention, whether made by himself or any other person." The evident reference here is to the scope of the two patents under consideration, and its import is that, although Morse might have included in his first patent the arrangement or combination described in his second patent, yet as it was not claimed in the former, and was not,

therefore, covered by it, he might make such arrangement the subject of a new claim and obtain a patent for it.

In *The Suffolk Co. v. Hayden*, 3 Wend. 315, a patent for an invention which was described, but not claimed, in a previous patent was sustained upon the ground that the invention, although described, was not covered by the first patent, and that this omission to include it did not operate as an abandonment of the improvement to the public.

There is another feature in the case which brings it into notable resemblance to the present case. Before the second patent above referred to was granted, an application by the same inventor was on file in the patent office for a patent for improvements in the interior arrangements of an elongated trunk, previously in use for cleaning cotton, among others, in the screen. Pending this application he applied for a patent for the improvement in the screen, in both the specifications filed similarly describing this improvement. A patent was granted upon this application, and sometime afterwards a patent also upon the original application. In reference to these two patents the court say that if they are for the same improvement the last one issued, and not the first, is void; obviously not for the reason that the description in both specifications was the same, but that the allowance of the last patent was futile, and that the original application for it was superseded and abandoned by the successful application for the first. But the court says further that the last issued patent does not appear to be for the same improvement covered by the first, but for a combination with it of other devices, thus clearly implying that the patent is good.

Now these cases, with others of like character, establish:

1. That of two patents for the same invention the one last granted is void, although it may have been first applied for.
2. Whether two patents cover the same invention must be determined by the tenor and scope of their claims, not by the description in the specifications.
3. That separate patents for severable parts of the same invention may be granted, although the whole invention is fully described in each of them to explain the purpose and

mode of operation of the parts covered by the claims in such patents.

4. That the connection or combination of a patented device or improvement with other devices may be the subject of a valid subsequent patent,

Accordingly, then, the patent of 1867 must be held to be valid, and, as the defendant is proved to have infringed it, there must be a decree for the complainant, as prayed for.

NOTE.—See *Bulcock v. Judd*, *ante*, 408.

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HEYNSOHN *v.* MERRIMAN and others.

(District Court, S. D. New York. April 7, 1880.)

**WAGES—DISABLED SEAMAN LEFT BY MASTER IN FOREIGN PORT.**—A seaman, though sick, who is left by the master in a foreign port, without his consent and without being discharged, is entitled to his wages up to the end of the voyage, or until he can get back to his home port.

**SAME—REV. ST. § 4582—PAYMENT TO CONSUL IN FOREIGN PORT.**—Section 4582 of the Revised Statutes, has no application to a seaman discharged in a foreign port without his consent; and enforced payment of wages to a foreign consul, under the provisions of that statute, will not affect the rights of the libellant.

In Admiralty.

*Alexander & Ash*, for libellant.

*Andrews & Smith*, for defendants.

CHOATE, J. This is a suit for wages. The libellant shipped, as able seaman, on the bark John Zittlosen, of which defendant was master, at New York, January 3, 1875, on a voyage to Queenstown, and thence to certain other ports, and back to a port of discharge in the United States—the voyage not to exceed 14 months, at \$20 a month wages.

About June 5, 1875, the bark arrived at Buenos Ayres, with the libellant sick on board, and he was placed in a hospital there soon after the ship's arrival, and remained in the hospital 16 days, when the master again took him on board, and he continued to work on board for about 35 days, when, being again sick and unable to work, he requested the master to send him to the hospital again. The master put him

ashore, and the bark sailed from that port, leaving him sick on shore. He was not discharged, nor paid his wages.

The bark went from Buenos Ayres to Valparaiso, and the United States consul there, being informed that the libellant had been left sick at Buenos Ayres, without being discharged, and without payment of his wages, refused to clear the vessel until the sum of \$85.97 was paid to him, that amount being claimed by the consul as the wages actually due to libellant, and three months' extra wages.

The master paid this sum to the consul, who credited it to the sailors' relief fund of the Valparaiso consulate, but no part of the money was paid to the libellant. The libellant remained in the hospital till November 24, 1875, when he was discharged therefrom as cured.

On the fifteenth of February, 1876, he shipped on another vessel for the United States. This was the first berth he was able to obtain in order to get home after leaving the hospital.

The libellant claims his wages up to January 15, 1876. The defendant claims that the payment at Valparaiso discharges him from all liability, or, if not, that he should be credited with that payment.

The libellant is clearly entitled to his wages for the time claimed. A seaman, though sick, who is left by the master in a foreign port, without his consent and without being discharged, is entitled to his wages up to the end of the voyage, or until he can get back to his home port. *Nevitt v. Clarke*, Olc. Adm. 320.

The defendant claims that the payment at Valparaiso works a satisfaction of the libellant's claim for wages, under Rev. St. § 4582. But I do not perceive that that section has any bearing on the case. By it a master is required, on discharging a seaman, who is a citizen of the United States, with his own consent, in a foreign country, to produce to the consul the certified list of his ship's company, and to pay to the consul the wages due, and three months' extra wages. That is, if the defendant had, with the consent of the libellant, discharged him at Buenos Ayres, he must have paid to the consul there the wages due up to that time, and three months'



extra wages, and this would have released him and the vessel from further liability under the contract.

Of the extra wages so paid two-thirds would have gone by the statute to the seaman himself, and one-third to a fund for the relief of destitute seamen. But there is no pretence that the libellant was discharged with his own consent, and therefore the statute can have no possible application to effect the release of the vessel or the master. Nor can the libellant's rights be in any way affected by the act of the consul at Valparaiso, which appears to have been unauthorized, in exacting this payment from the master.

Decree for libellant, with costs.

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### ANDUS v. THE STEAMBOAT SARATOGA.

(District Court, S. D. New York. March 13, 1880.)

**INJURY TO TOW-BOAT—DUTY OF STEAMBOAT IN PASSING TOW.**—If a steamboat cannot safely pass on either side of a tow, traveling in the same direction, it is her duty to wait until they have reached a point where she can thus pass in safety.

**SAME—SAME—TOW ON THE WRONG SIDE OF THE CHANNEL.**—The mere fact that the tow was on the wrong side of the channel would not justify the steamboat in violating her plain duty to keep out of the way of the tow, when she had such tow in plain sight, and was able to do so.

In Admiralty.

*F. A. Wilcox*, for libellant.

*S. H. Valentine*, for claimant.

CHOATE, J. This is a libel by the owner of the canal-boat Belle Andus for injuries sustained while on a voyage from Troy to New York, in tow of the tug James McMahon, on the twenty-first day of September, 1877. There were 11 boats in the tow, in four tiers, each tier having three boats, except the last, which had two. Libellant's boat was the starboard boat in the third tier, and directly astern of her was one of the boats in the last tier. The tow was proceeding down the river at a rate of about three miles an hour, and when she had reached the upper end of the long dike, about half a mile

below the lower bridge at Albany, the steamboat Saratoga, a large passenger boat, about 300 feet long and 66 feet wide, bound from Troy to New York, was following nearly astern of the tow, being just below the bridge, but having the tow a little on her port bow. The speed of the Saratoga was about six and a half miles an hour, so that she was rapidly overtaking the tow. When she got within about 300 yards of the stern of the tow her pilot determined to pass on the eastward side of the tow—that is, between the tow and the dike, along which the tow was still passing—and he blew two whistles, to indicate to the pilot of the tow that such was his intention. To this signal he got no reply from the tow, but he kept on, putting his wheel to starboard.

The principal question of fact in the case is whether there was room between the tow and the dike, when the Saratoga made this movement, to justify her in attempting to pass on that side of the tow. The witnesses from the tow, except the pilot of the tug, put the distance at 20 to 30 feet, the pilot of the tug at 50 to 75 feet, and the captain, pilot and wheelsman, of the Saratoga at 80 to 100 feet. I am satisfied that the witnesses from the canal boats have underestimated the distance, and that the Saratoga would not have attempted this maneuver if the tow had been within 20 to 30 feet, for it was evident that her pilot could not have expected the tow to get out of the way after he gave the signal and starboarded to get on the eastward side of her; but, on the other hand, it is evident from the testimony of those from the Saratoga that when she got up as she did, lapping the stern boat in the tow by about 40 feet, they found it impossible to clear the tow and pass between her and the dike.

The starboard guard of the Saratoga actually came in contact with the stern boat of the tow, while she was thus lapping and backing her engine to get herself out of the way. The witnesses from the Saratoga attempt to explain this by testifying that while she was thus lying still in the water, with her engine reversed, the tow sagged down with the wind some 40 feet against the Saratoga. This theory has no support except in the imagination of these witnesses. The proof is

that there was no such wind as would be necessary to make this change in the tow, and if there had been the tow, which kept on all the time, would have grounded or been windbound against the dike long before she reached the end of it. It is evident enough that the reason why, in trying to pass the tail of the tow, the Saratoga came in contact with it, was that there was not space between it and the dike for her to go in there without touching the tow. The evidence is that the water is deep close up to the dike, and if there had been room enough for her to go in there at all she would have left some space between herself and the tow.

The steamboat's witnesses also say that there was room enough there, but that when she got there they saw the McMahon change her course to the eastward, and that then, for the first time, they saw they could not get by, the difficulty being not that they could not pass the tow, but that if they passed the tow they could not afterwards pass the McMahon. There is not sufficient proof of the alleged change of course on the part of the tug, and if there were, as the same witnesses also say it had not been made long enough to affect the course of the tow, it would seem to furnish no justification for coming in contact with or so close to the stern of the tow, if there was room enough to avoid it. Upon the whole testimony I think there was not room enough to justify the Saratoga in attempting to pass on the port side of the tow, and that she was chargeable with negligence in getting into the position in which she found herself compelled suddenly to reverse her engine and back, while crossing the tail of the tow at a slight angle and close astern of it.

The testimony is that at this point the channel is narrow, and the swell from the wheels of a steamer is more dangerous than at points in the river where the channel is less contracted. There was room enough for her to go down on the starboard hand of the tow, as she did after backing out, leaving a clear space between them of 30 feet or more. Just below this point, also, the river widens out, so that, if she could not have safely passed on either side, it was her duty to wait till they reached a point in the river where she could

have safely passed. The effect of her backing, in so close proximity to the tow, was to raise a swell which dashed the canal-boats together with such violence that several of them, including the libellant's boat, were seriously damaged. There was no proof to sustain the averments of the answer that libellant's boat was unsound and unseaworthy.

The *Saratoga* is clearly liable for the damages sustained. *The C. H. Northam*, 13 Bl. 31.

The suggestion that the law of the state required the tow to keep on the western side of the channel is not material in the present case, since the tow being in the wrong place, if she was so, would not justify the steamboat in violating her plain duty to keep out of her way, having her in full sight, and being able to do so.

The position of the tow was not the cause of the injury.

Decree for the libellant, with costs, and a reference to compute the damages.

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THE C. H. FOSTER (WILLIAM K. DUNCAN v.)

GEORGE N. COOMBS v. WILLIAM K. DUNCAN.

THE C. H. FOSTER (GRANVILLE E. CARLETON v.)

(Circuit Court, D. Massachusetts. April 17, 1880.)

COLLISION—CONTRIBUTION FOR CARGO OUT OF DAMAGES DUE FOR LOSS OF VESSEL—PLEADING—AMENDMENT—CONFORMATION OF DECREE TO FACTS ARISING AFTER LIBEL HAS BEEN FILED.

In Admiralty.

*John C. Dodge* and *Frederic Dodge*, for the C. H. Foster.

*Frank Goodwin*, for the *Helen Mar*.

LOWELL, J. These three cases arose out of a collision between the schooners *Helen Mar* and *C. H. Foster*, by which the *Helen Mar* and her cargo were totally lost; and some damage was suffered by the *C. H. Foster*, but none by the cargo which was on board of that vessel. The cases were tried together, and both vessels were declared blameworthy, and the damages have been assessed. No exception has been taken to any of the findings of law or fact excepting one, which was ruled

*pro forma* in the district court, it being thought more convenient for the parties that I should decide it, as I tried the case when district judge.

The owners of the cargo could have proceeded against either vessel; but one having been destroyed, the liability of the owners of that vessel, the *Helen Mar*, was limited to her value. Rev. St. § 4283. They therefore brought their libel against the *C. H. Foster*, and have recovered a decree for their whole damage.

In the two cases between the vessels a balance is struck, and there is found due to the owners of the *Helen Mar* a sum, not very large, but somewhat more than half as much as the *C. H. Foster* has been decreed to pay to the owners of cargo.

Under these circumstances, the owners of the *C. H. Foster* represent that they ought not to be obliged to pay the whole sum decreed to the owners of the *Helen Mar*, when they will have a right to recover against them one-half of the damages paid on the cargo, which is nearly as large, and these owners are not within this jurisdiction. The first question, then, is whether the owners of the *Helen Mar* are bound, as between themselves and the owners of the *C. H. Foster*, to contribute for the cargo out of the damages due them for the loss of their vessel.

It seems to me that this question must be answered in the affirmative. As between these parties the damages represent the vessel, and it is a question how much each ought to contribute. It is upon this principle that a cross-libel is brought in such cases against the owners of the lost vessel, not that the libellants expect to recover personal damage, but that the amount may be properly adjusted between the two vessels, so that their own liability may be diminished. Such were the facts in another case, where one of the vessels, which happens to have the same name as the vessel lost here, was a total loss, but it was taken for granted that she was to contribute. *The Ontario v. Helen Mar*, 2 Lowell, 40; 1 Holmes 467. I have seen a copy of an able opinion of Judge Choate to the same effect. *Leonard v. Whitwill*, December 12, 1879.

The arguments turned chiefly upon the point of pleading whether there is any mode by which the owners of the *C. H.*

Foster can obtain this contribution in the present state of the proceedings, or by an amendment.

This point does not seem to me to present any difficulty. Part of the damages which the owners of the C. H. Foster have suffered are those which her owners have been, or will be, obliged to pay for the cargo, and they come in simply under a claim for damage; as in the well-known insurance case, where, in an action on a policy, the assured recovered the damages paid for collision with another vessel. *Nelson v. Suffolk Ins. Co.* 8 Cush. 477. The supreme court of the United States decided that point of insurance law differently from the judgment in Massachusetts, but not on the point of pleading. If, therefore, the libellants in *Coombs v. Duncan* (No. 1413) had paid for the cargo before bringing their libel, they would properly have included the amount in their claim for damages to be set against those recovered of them in No. 1412. If they do so now it is not too late, because a decree in admiralty is often conformed to facts arising after the libel is filed.

The money should be paid into court for the owners of the cargo within 15 days from the date of this opinion, and thereupon the decree in *Coombs v. Duncan* should show that one-half this sum is included in the damages, so that no question can arise hereafter upon that subject. The libel may be amended if the parties think it desirable.

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MAYO and others v. CLARK and others.

CLARK and others v. MAYO and others.

(Circuit, Court D. Massachusetts. April 17, 1880.)

TOWAGE SERVICE—SALVAGE.

In Admiralty.

*John C. Dodge* and *Frederick Dodge*, for libellants.

*C. T. Russell* and *C. T. Russell, Jr.*, for claimants.

LOWELL, J. The decision of this case depends upon the single question whether, under the circumstances in which the vessel was taken in tow, the libellants were justified in

supposing that they had undertaken a salvage service. Nothing was said by either party at the time; and if the wind had gone down rapidly, and the barkentine had been towed to Boston without much difficulty, we might never have heard of a salvage claim. But matters did not turn out in this way. There was difficulty and danger, and another tug was obliged to come to the assistance of the libellants, to prevent serious danger if not loss to the Frank Lambirth. That tug was undoubtedly a salvor, and has been paid as such since the case left the district court.

Upon the whole evidence, which was very elaborate and full, I am of opinion that the Frank Lambirth was in danger at the time the tug Woolley came up. I think there had been one failure to tack. Some of the witnesses deny this, but they are, perhaps, referring to a later period than at which the second mate of the barque says that they did try to go about without success. Whether he is accurate or not, I think the vessel either was, or was thought to be, unable to tack, and would have found it necessary to come to anchor in a very short time; and, as she was on a lee shore, there can be no doubt that if she had been at anchor there would have been, as the wind and sea then were, need of speedy relief.

I do not think that the libellants were as careful as they should have been in respect to the scope of hawser, and it is not improbable that the parting of the hawser would not have occurred if more scope had been given. But I am not at all sure that this accident had much effect upon the result of the adventure. Without it the tug must have had assistance, and the assisting tug would have been a salvor.

Upon the whole, while I would not encourage any real or supposed readiness which owners of tugs may have to convert a simple towage service into one of salvage, I find that the peculiar facts of this case relieve it of any such appearance.

The amount awarded was liberal, but no serious objection was raised to it.

Decree affirmed, with costs.

*In re* EDWARD S. MAY.

(District Court, E. D. Michigan. ———, 1880.)

**CONTEMPT—JUROR—CONFERRING WITH A PARTY TO THE SUIT—REV. ST. § 725.**—Under section 725 of the Revised Statutes, a juror in a federal court is guilty of a contempt in corruptly conferring with a party to a suit during the trial, it appearing that the court had expressly forbidden the jury to converse with any one regarding the case.

**SEMBLE.**—It seems that he would be guilty of contempt even if no such direction were given.

**CONTEMPT—ANSWER OF RESPONDENT.**—In proceedings for criminal contempt the answer of the respondent, in so far as it contains statements of facts, must be taken as true; if false, the government is remitted to a prosecution for perjury.

**SAME—SAME.**—But the answer must be credible and consistent with itself; and if the respondent state facts which are inconsistent with his avowed purpose and intention, the court will be at liberty to draw its own inferences from the facts stated.

Motion for an attachment for contempt of court.

Respondent was duly empanelled as a juror in the case of *The United States v. Sigmund and Feist Rothschild*, indicted with Marcus Burnstine and others for conspiracy to defraud the government. A petition and affidavits having been produced tending to show that respondent had been guilty of misconduct in his capacity of juror, an order was issued to show cause why he should not be attached for contempt. Upon the trial of the principal case the jury were cautioned not to talk with any person, nor allow any person to talk with them, and upon a subsequent day the court again took occasion to direct the jury not to allow any person to converse with them concerning the case, and to accept no treats or hospitality from any person interested in or connected with the case.

The order to show cause set forth that on the twenty-eighth of December, 1879, respondent went in the night-time to the house of Marcus Burnstine, one of the said defendants, but not then on trial, for the purpose of corruptly conferring with said Burnstine of and concerning said cause, and of and concerning the verdict to be rendered therein, and did then and there talk with said Burnstine, and did allow Burnstine



to talk with him, concerning the facts and evidence in the case, and also did corruptly negotiate with said Burnstine as to the verdict he should render in said cause, and that respondent was guilty of misbehavior in the presence of the court, or so near thereto as to obstruct the ends of justice, in the facts above set forth.

The answer of the respondent admitted hearing the orders of the court above referred to, but denied that he violated said orders. Respondent further denied that he had any conversation or negotiations with Burnstine whereby, for any consideration, he would, in declaring his verdict, favor the defendants. With regard to the alleged interview with Burnstine, which took place after the arguments had been concluded, and the night before the charge was given and the case committed to the jury, respondent averred that he was a physician, practicing his profession in Detroit, within a half a block of Burnstine's residence; that on Sunday, the twenty-first day of December, a man, calling his name Miller, residing, as he said, upon Gratiot street, called upon the respondent for professional treatment; that, after examining and prescribing for him, Miller said to him, "You are a juror in the tobacco trial," and began to talk of the innocence of Rothschild, and his standing in the community, when the respondent said to him, most emphatically, that he must not talk in that way to him, as it was against his duty to speak of the case; that Miller then stated that the respondent's conscience was too tender, or words to that effect, and that he could just as well make money out of this; that he had himself once been a juror, and got \$250, and nobody ever heard of it. Respondent protested against such talk; and when Miller was going toward the door he said that respondent could make \$400 or \$500, and that he would call again.

He further says that he made up his mind to inform the court of the matter next morning. But on further reflection, remembering the man's statement that he would call again, respondent determined to wait, accept what he might offer him, and present it to the court with a public exposure; that on the same day he prepared an envelope and addressed it to

the judge of the court, in which he proposed to put whatever should be handed to him by Miller, seal it up and hand it to the court in that condition; that he carried the envelope in his pocket all that week but did not again see Miller; that in the latter part of the week he became anxious about the matter; thought he had neglected his duty in not exposing the matter at first, and thought again of speaking to the court, but did not from the fact that he had not ascertained positively whom the said Miller represented, and that he might be doing a grave injury and injustice to the defendants, if it should turn out that he did not represent them, as he considered that the trial was nearly at an end, and that Miller might possibly, if representing an interest adverse to the Rothschilds, have taken just that course to prejudice them with the respondent as a juror, and thinking the matter over he concluded that a man who would want to do a grave injury to Rothschild might have taken the very course that Miller did take to injure him.

He further averred that he was clearly of the opinion that he ought not to allow the trial to close without taking some steps in regard to the matter; and on the evening of Sunday, the twenty-eighth of December, before it was fairly dark, respondent, thinking that if Miller had come from the defendants Burnstine would know all about it, respondent could determine the fact as to whom Miller represented by going to Burnstine; that he went up the steps of Burnstine's house and rung the bell; a boy came to the door, who asked respondent in, but respondent declined to go in, and asked to have Burnstine step to the door. Burnstine came to the door. Respondent asked him if he knew him, when respondent asked him, "Do you know a man by the name of Miller," believing that, from the question being put in that way, if Miller had any privity with Burnstine the matter would be exposed by Burnstine, and he would think respondent came to treat with reference to Miller's proposition. Without answering that directly, Burnstine insisted upon respondent coming in, which he did, and stayed not to exceed five minutes, when the whole conversation turned upon the question

whether Miller represented or came from the defendants, which was all that respondent wanted to know. Burnstine, on his side, said that Miller did not represent them, and that he did not know of any such man, but said that Rothschild might, and he would go and get Rothschild.

Respondent refused to allow him to go and get Rothschild at all, but said that he, the respondent, simply wanted to know the fact as to whether Miller came from the defendant or not. Burnstine asked respondent what he thought of the case, when respondent at once stated that he could not talk with him about that, but simply wanted to know the fact stated, and would not stay and converse with him and Rothschild, and told him that he knew nothing about the jury; that he could not get a word out of him, respondent, and that respondent would not talk about the case at all, or as to the way the jury stood. Respondent was about going out, and Burnstine said he was going down to see Rothschild, and he would find out whether he knew Miller or anything of him, and asked the respondent if he would call at 10 o'clock, when he would let him know. He further offered respondent a cigar and a drink, which he declined. He did call again about 10 o'clock, when Burnstine, with something of an air of mystery, insisted that respondent should walk through to his office. Respondent went in but did not sit down, when Burnstine said that Rothschild knew nothing of Miller at all, and that Rothschild scouted the idea; that he would have nothing to do with buying or corrupting a juror, and stated they would not pay a cent to any one for such purpose, but he said that the matter with regard to Miller was very important, as they had no doubt but that Miller represented the other side, and that the defence had been trying to catch some one doing just this thing, as they knew it was going on, and he said to respondent that the man called Miller undoubtedly represented the other side, and asked respondent to point him out in the court room the next morning so that he might be exposed, or to let the lawyers of the defence know whenever respondent could put his eyes on him again, and say nothing about it until he was caught, to which respondent assented.

He further averred that at both interviews he had he related the substance of his conversation with Miller, but, from the first, having the purpose in view of getting Rothschild and Burnstine to admit their connection with Miller, if true. He thinks that the respondent may, by his manner, have invited a continuance of the Miller negotiation; that in these interviews he became satisfied that neither Rothschild nor Burnstine had anything to do with the man that had approached him, and became thoroughly satisfied the object the man had was to injure the defendants. He further averred that he made no secret of his going to Burnstine's; went in and out the front way both times, and was not disguised in any manner, and in neither interview did the respondent talk himself, or allow said Burnstine to talk to him, about the facts of the case then on trial; that up to that night he had never spoken to Burnstine, nor has he spoken a word to him since. He further denied any contempt, and if his going to Burnstine's house was a disobedience of the order of the court it was not so to respondent's knowledge or understanding of the orders, and he did it for the purest and best motives, and for the purpose of serving the ends of justice, by exposing fraud and corruption, which it seemed impossible to accomplish in any other way; as, if the man who had attempted to corrupt the respondent represented the defence, it could have been ascertained in no better way than by respondent in person applying to Burnstine, and he did it with the motive and intention that if he should fasten the corrupt approach of Miller upon the defence he would have exposed it the next morning, and he did not think the ends of justice would be subserved to expose the facts otherwise until Miller could be identified; that he did not inform any person of the matter for the reason that he thought a grave crime had been committed, and he desired to identify the man and bring him to justice; and he believed that if he did give any information to the court at that late stage of the case, there being no time for an investigation, it would simply put the guilty parties upon their guard, and might prejudice the minds of the court and jury against the defendants, because the respondent would

be obliged to state that the man claimed to represent the defence, and leave no time to disabuse their minds.

He further says that his action in maintaining his position for an acquittal upon the jury was in accordance with his judgment upon the evidence, as confirmed by the charge of the court, and that, added to this, the information that he had received as before stated, convincing him of indirect methods having been used to influence him, the respondent, impelled him to maintain the innocence of said Rothschild on the jury to the last. He further denied receiving money or any other consideration for his vote upon the jury, and submitted that his conduct had been free from censure.

*S. M. Cutcheon*, District Attorney, and *H. J. Beakes*, for the government.

*John Atkinson* and *Theodore Romeyn*, for respondent.

*Brown, J.* By Rev. St. § 725, the power of the federal courts to punish for contempts is limited to three classes of cases: *First*, a misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice; *second*, misbehavior of any officer of the court in his official transactions; and, *third*, disobedience or resistance of any officer, party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the courts. *Ex parte Robinson*, 19 Wall. 505, 511.

It is not necessary here to discuss the question whether, in the absence of the express order of the court to the jury to refrain from conversing with any one regarding the case, a juror could be punished for such misconduct. It would seem, however, that such violation of duty might be reached under the first class of cases, as the misbehavior of a person so near the presence of the court as to obstruct the administration of justice therein. The act does not define how near the court the misbehavior must be, nor the character of such misbehavior, and I think it may be fairly construed to extend to any misbehavior by a juror, in his capacity as such, wherever committed, since such misbehavior necessarily tends to obstruct the administration of justice. *U. S. v. Devaughan*, 3 Cr. C. C. 84; *State v. Doty*, 32 N. J. 403. Otherwise it would

be impossible for the federal courts to punish a juror, even for receiving a bribe, since there is no statute making the receipt of a bribe by a juror a crime. The act was passed for the purpose of preventing the courts from interfering with newspaper comments upon trials. It seems to me it could not have been the intention of congress to take away from the courts the common law power of punishing jurors for misconduct. Upon this point, however, I express no opinion, as it is admitted there was an order given, and the only question is whether respondent disobeyed it.

It is a cardinal rule in proceedings for a criminal contempt that the answer of the respondent cannot be traversed and must be taken as true. If false, the government is remitted to a prosecution for perjury. 4 Black. Com. 287; *In the matter of Pitman*, 1 Curt. 186; *U. S. v. Dodge*, 2 Gall. 313; *State v. Earl*, 41 Ired. 464; *Burke v. The State*, 47 Ired. 528; *People v. Feed*, 2 John. 290; *In re Moore*, 63 N. C. 397; *Nomes v. Cummins*, 1 Lester, 40.

But the answer must be credible and consistent with itself, and if the respondent states facts which are inconsistent with his avowed purpose and intention, the court will be at liberty to draw its own inferences from the facts stated. *In the matter of Crossley*, 6 Term R. 701; *Ex parte Nowlan*, Id. 118. For instance, if the respondent in this case had stated that in his interview with Burnstine he had asked and received of him a \$1,000, and had kept the money in his pocket until after the jury were discharged; and had further stated that he did this for the purpose of delivering the money to the district attorney and prosecuting Burnstine for bribery, it would scarcely be contended that the court would be bound to draw the same inference from his conduct. So, then, it is, after all, a question in every case whether the facts stated are consistent with an honest intent.

The prosecution insist in this case that Miller was a myth; that respondent's story with regard to his interview with him was concocted solely for the purpose of explaining the subsequent interview with Burnstine. The court, however, cannot accept this theory. I must take it for granted that the

interview with Miller was had substantially as stated. Respondent had no power to prevent Miller from conversing with him as he did, and suggesting that money might be made out of the case, but he should at once have disclosed the fact to the court; or, at least, he should not have assumed to take on the character of a detective and work up a case for the government without consultation with the officers of the government. If, as Miller said, he had been present several days during the trial, he was probably present during some of the days that succeeded his interview with the respondent, and might have been identified. Respondent, however, seems to have made no effort to ascertain whether Miller was in the court room, but keeps the facts to himself for a whole week, and at the most critical moment of the trial, after the arguments had been concluded, and the evening before the jury were to be charged, goes to the house of one of the defendants after dark to ascertain whether Miller represented him or any of the other defendants in the case. What business was it to him whether Miller was sent by the defendants or not? Suppose he had been sent by Burnstine, what was the respondent to do about it? He was not even content to take Burnstine's word that he knew nothing about Miller, but consented to make another visit at a late hour in the evening, in the meantime suggesting to Burnstine that he see Rothschild and learn whether he knew anything of Miller. The records of the court show that the jury in this case disagreed. It does not, of course, show how they stood. But the respondent, in his answer, admits that he continued to vote for an acquittal until the end, giving, among other reasons, that he thought Miller had been trying to prejudice him *against* the defendants, when he admits that Miller had talked of the innocence and good standing of the defendants, and had suggested that money might be made out of the case.

Suppose a verdict of guilty had been rendered, or, to put the case stronger, suppose it had been a civil case and a verdict had been rendered for the defendants, would it not have been the duty of the court, on respondent's own showing, and

to put the most favorable construction upon it, to grant a new trial on account of his misbehavior? It seems to me entirely clear that it would. Without looking at the affidavits upon which this order was issued, and which show a somewhat different state of facts, it seems to me clear, beyond a reasonable doubt, that respondent went to Burnstine's house, not for the purpose of detecting Miller or any other person, but rather with the intention of entering into a corrupt negotiation with Burnstine. He thus put himself in a position where he could not do otherwise than persist in voting for an acquittal, since an exposure of his conduct was certain, if defendants were convicted. The respondent is therefore adjudged guilty of the specification charged in the order to show cause, viz.: "Going in the night-time to the house of Marcus Burnstine, one of the defendants, for the purpose of corruptly conferring \* \* \* with said Burnstine of and concerning said cause, and of and concerning the verdict thereafter to be rendered therein;" and is further adjudged to pay a fine of \$100, and to be committed to the Detroit House of Correction until the terms of his sentence are complied with.

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ATLANTIC & PACIFIC TELEGRAPH COMPANY v. UNION PACIFIC RAILWAY COMPANY and another.

(Circuit Court, D. Nebraska. —, 1880.)

CORPORATION—CONTRACT—ULTRA VIRES—INJUNCTION.—Although a contract may have been *ultra vires*, a court of equity will restrain a corporation from recovering possession of property which has passed thereunder, without due process of law and a return of the consideration paid.

Motion for injunction.

McCrary, J. By act of congress, approved July 1, 1862, and acts amendatory thereof, the Union Pacific Railroad Company was created a corporation with power to "lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph, with appurtenances," from the Missouri river, through Nebraska and Wyoming, to a junction with the Cen-



tral Pacific Railroad in Utah. Under this authority the said railroad company built, and early in 1869 completed, its railroad and telegraph over said route. The plaintiff is a corporation organized under the laws of the state of New York.

On the first day of September, 1869, the plaintiff and said Union Pacific Railroad Company entered into a contract, whereby, among other things, the railroad company agreed to demise and lease to plaintiff "all its telegraph lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraphic business; to have and to hold for and during the whole term of the charter of the party of the first part [the railroad company] and any renewals thereof, subject to the rights of the United States as set forth in the charter of the railroad company, and on the condition that the plaintiff would faithfully and fully perform all the duties imposed or to be imposed upon the railroad company by its charter or by the laws of the United States."

On the twentieth day of December, 1871, a supplemental agreement was entered into between said parties, by which certain changes were made in the original contract. Among other things, it was provided in said contracts that the railroad company should receive from plaintiff, in consideration for the same, 17,800 shares of the capital stock of the plaintiff corporation, (the Atlantic & Pacific Telegraph Company,) which stock the railroad company received and applied to its own use. Said contracts were duly performed on both sides until the twenty-seventh day of February last, when the railroad company assumed, of its own motion, to rescind the same, and to resume possession and control of the property; for which purpose its agents cut the wires running from the general offices of plaintiff, for commercial business, at Omaha, and severed said offices from the main line. It is charged in the bill that this was done for the purpose of giving the business of said line at Omaha, and all the advantages thereof, to the defendant, the American Union Telegraph Company,

a competitor and rival of plaintiff in the business of telegraphing.

The Union Pacific Railroad Company, by consolidation with another company, has become the Union Pacific Railway Company, by which name it is sued.

The prayer of the bill is, among other things, for an injunction to restrain the defendants from disregarding the two contracts above mentioned, and from interfering with the property covered thereby, except as in said contracts provided, and from preventing the plaintiff from reconnecting the wires so as to restore them to their original condition before the same were cut. On the first of March it was ordered that the application for injunction be heard before me, at chambers at St. Louis, on the sixth of April, 1880, and in the meantime a preliminary injunction was allowed.

The defendants have answered fully, and numerous affidavits have been filed. Upon the record thus presented counsel have been fully heard, both orally and by printed briefs.

The Union Pacific Railway Company, defendants, admit the cutting of the wires as charged, as well as their purpose to disregard the contracts, and retake the telegraph lines and property, and in justification allege that said contracts were beyond the power of the company to make, contrary to public policy, and in violation of the acts of congress chartering the Union Pacific Railroad Company, and that they are therefore void. The question of the validity of these contracts is the first to be considered.

1. The rules by which this question is to be determined are now well settled, at least in the federal courts. They have been clearly stated by the supreme court in the recent case of *Thomas et al. v. The West Jersey R. Co.* (not yet reported.) From the opinion in that case, delivered by Mr. Justice Miller, I make the following extracts, as laying down the law by which I must be guided:

"We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of a corporation organized under legislative statutes are such and such only as those statutes

confer. "Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others.

\* \* \* \* \*

"There is another principle of equal importance, and equally conclusive against the validity of this contract, which, if not coming exactly within the doctrine of *ultra vires*, as we have just discussed it, shows very clearly that the railroad company was without the power to make such a contract.

"That principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in a large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions—which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes—is a violation of the contract with the state, and is void as against public policy. This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in the case of *The York & Maryland Line Railroad Co. v. Winans*, 17 Howard, 30. The corporation in that case was chartered to build and maintain a railroad in Pennsylvania by the legislature of that state. The stock in it was taken by a Maryland corporation, called the Baltimore & Susquehanna Railroad Company, and the entire management of the road was committed to the Maryland company, which appointed all the officers and agents upon it, and furnished the rolling-stock.

"In reference to this state of things, and its effect upon the liability of the Pennsylvania corporation for infringing a patent of the defendant in error Winans, this court said: 'This conclusion [argument] implies that the duties imposed upon the plaintiff [in error] by the charter are fulfilled by the construction of the road, and that, by alienating its right to use and its powers of control and supervision, it may avoid further

responsibility. But these acts involve an overturn of the relations which the charter has arranged between the legislature and the community. Important franchises were conferred upon the corporation to enable it to provide facilities for communication and intercourse required for public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature. *Beman v. Rufford*, 1 Simon N. S. 550; *Winch v. B. & L. R. Co.* 13 Law and Equity, 506.'

"And in the case of *Black v. Delaware & Raritan Canal Co.* 7 C. E. Green, N. J. Eq. 399, Chancellor Zabriskie says: 'It may be considered as settled that a corporation cannot lease or alienate any franchise, or any property necessary to perform its obligations and duties to the state, without legislative authority.' For this he cites some 10 or 12 decided cases in England and this country."

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The case in which these propositions of law was announced was this: A New Jersey railroad corporation, without express authority, undertook to lease to another company for 20 years its railroad, with all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls. The contract or lease was confirmed by a vote of the stockholders. The lessor was authorized to cancel the lease upon giving three months' notice, but in that event was to be liable to pay the damages incurred by the other party by reason of such action. Under this provision the railroad company ended the contract, and resumed possession of the leased road. The suit was by the lessee for the damages provided for, and it was held that no recovery could be had because the contract was *ultra vires*. It remains to apply these principles to the case in hand.

2. It is certain that the contracts in question amounted to a lease, or alienation, by the Union Pacific Railroad Company, of property which was necessary to the performance

of its obligations and duties to the government, and to the public.

In my judgment the act of July 1, 1862, and its amendments, must be construed as chartering the Union Pacific Railroad Company, and devolving upon it, individually and personally, the power and duty of constructing, operating and maintaining a line of telegraph, as well as a railroad. This is made manifest by the consideration that the government endowed the corporation with large grants of land and bonds, to aid in the construction of these lines, and impressed upon the company the duty of reimbursing the government from the earnings of the road and telegraph line. Section 6, act of 1862. It is also clear from the language of the first section of said act, which empowers the corporation "to lay out, locate, construct, furnish, *maintain and enjoy* a continuous railroad and telegraph, with the appurtenances," that the power conferred was personal, and carried with it a duty and an obligation which could not be transferred.

The very same language which authorizes the construction and operation of the telegraph line also authorizes the construction and operation of the railroad, and the property in the one is as necessary to the performance of the public duties of the corporation as that in the other. The charter of the company, with the amendments, considered as a whole, was manifestly intended to create a corporation which should be personally amenable to the government, in the exercise of the powers conferred, and which should in *quasi* public capacity perform the duties imposed, and render an account of its earnings.

The purpose was not to authorize the construction of a line either of railroad or telegraph to be thereafter sold, leased or transferred to other parties, leaving the government to the chances of securing from or through the lessee or vendee its proportion of the earnings. This is made still more clear by the provisions of the act of June 20, 1874, amending the charter, which imposes upon the company and its officers and agents penalties for a failure to operate or use said railroad or telegraph, *so far as the public and the government are con-*

cerned, as one continuous line, and which gives a right of action to any party aggrieved, "in case of failure or refusal of the Union Pacific Railroad Company, or either of said branches, to comply with this act or the acts to which this is amendatory."

I conclude that the charter of the Union Pacific Railroad Company devolved upon it the duty of constructing, operating and maintaining a line of telegraph for commercial and other purposes, and that this is in its nature a public duty. I am further of the opinion that, by the provisions of the contract of September 1, 1869, and of December 20, 1871, the railroad company undertook to lease or alienate property which was necessary to the performance of this duty. The consideration for these contracts is declared to be "the demise of their telegraph lines, property and good-will, and of the rights and privileges, in the manner hereinafter specified," etc., and the property demised by the railroad company is all its telegraphic lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraph business. The lessee was to hold during the whole term of the charter of the railroad company and any renewal thereof. There is inserted a stipulation that the lessee shall perform all the duties imposed or that may be imposed upon the railroad company by their charter or by the laws of the United States. But, as already intimated, I do not think this latter clause makes the contract good. The railroad company was not at liberty to transfer to others those important duties and trusts which it, for a large consideration, and for a great public purpose, had undertaken to perform. It certainly could not divest itself of these powers and duties, and devolve them upon the plaintiff, without express authority from congress.

3. But if the contracts in question are not *ultra vires*, by reason of the transfer of property necessary to the performance by the railroad company of its public duties, they are so because they attempt to transfer certain franchises of the said company. The right to operate a telegraph line, and to fix

and to collect tolls for the use of the same, is, to say the least, the most valuable part of the franchise conferred by congress upon the railroad company, as a telegraph company. This right is alienated by a clear and unequivocal assignment or transfer from the railroad company to the plaintiff. Without discussing other features of the contracts I am compelled to hold that this feature is alone sufficient to render them in excess of the corporate power of the company.

4. This brings me to the question whether the railroad company can be permitted to rescind the contract, and on its own motion to take possession of the lines, offices and property, without first returning the consideration received therefor from the plaintiff. As already stated, the railroad company received from the plaintiff, in payment for the property and rights agreed to be transferred by said contracts, 17,800 shares of the capital stock of the corporation plaintiff. There is a dispute as to the value of the stock, but I believe it is not placed by any one of the deponents at less than \$150,000, while some of them place it at a much higher sum.

No case has been cited in argument, nor have I been able to find one, which holds that a court of equity, having jurisdiction of the parties to and the subject-matter of an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same thing. Many cases hold that a corporation which has made a contract *ultra vires*, which has not been fully performed, is not estopped from pleading its own want of power when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity, and, while retaining all that he has received upon such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and the subject-matter are now before the court, it is the duty of the

court, as far as possible, to place them in *statu quo*. It has been held that even in cases at common law a contract *ultra vires*, made between a corporation and another person, and under which the corporation has received value, which it retains, will be so far enforced as to estop the corporation from refusing payment on the ground of its own want of power. *Bradley v. Bullard*, 55 Ill. 417.

And in the case of *Thomas v. R. Co.* (supreme court U. S.) already quoted from at length, Mr. Justice Miller, upon this point, says: "There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred. And in regard to corporations the rule has been well laid down by Chief Justice Comstock, in *Parish v. Wheeler*, 22 New York, 404, that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms."

The present case, like the New Jersey case in which these remarks were made, is one on which the contract has been executed in part, but it differs from that case in one important particular. In the New Jersey case the court say that, "so far as it [the contract in question] has been executed, namely, the four or five years of action under it, the accounts have been adjusted and *each party has received what he was entitled to by its terms.*"

If that case had been in equity, and it had appeared that the railroad company had received in advance the full consideration for the whole term of the lease, which it retained, while asking to be relieved from the contract, I have no doubt



the court would have said: "You must come into this tribunal with clean hands; you must do equity before you can seek the aid of a court of conscience."

The contention of the railroad company is that it should be permitted to take possession of the property in controversy without process or legal proceedings. While I am clear that the contracts under which the property is held by plaintiff are *ultra vires*, there is a dispute upon that subject, and such a dispute as in my judgment cannot be determined by the railroad company of its own motion.

The right of rescission does not justify the railroad company in taking possession except by lawful means. The plaintiff has a right to be heard upon issue joined in a proper proceeding before being ejected. The present question is not whether the contracts should be rescinded and the property restored to the railroad company, but whether this should be done by the railroad company upon its own motion, and in a way to deprive the plaintiff not only of a hearing in the regular course of this court, but also deprive it of the right of appeal.

It is one thing for me to hold that the contracts are in my judgment *ultra vires*, and quite another to say to the railroad company, "You may turn the plaintiff out and take possession without giving it a day in court."

An injunction will often be granted to restrain a party from deciding for himself a question involving controverted rights, and to compel him to resort to the courts, and this without regard to the absolute merits of the controversy. It is enough that there is a controversy to justify a court of equity in directing that it be settled by legal proceedings. *Eckelkamp v. Schroeder*, 45 Mo. 505; *Varick v. New York*, 4 John. Ch. 53; *Dudley v. Trustees*, 12 B. Monroe, 610; *Farmers v. Reno*, 53 Pa. St. 224; *Sunsing v. Steamboat Co.* 7 John. Ch. 162.

The principle settled by these and many other cases is that a party who is in actual possession of property, claiming under color of title, is not to be ousted, except by the means provided by law, and such a possession the court will protect by injunction from disturbance by any other means. For this

reason, therefore, as well as upon the grounds above stated, I am clearly of the opinion that the railway company cannot be permitted to oust the plaintiff from possession without process.

The injunction, heretofore granted, will be so far modified as to make it clear that the railroad company is at liberty to institute legal proceedings, either by cross-bill in this case or otherwise, to cancel and set aside the said contracts upon a return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties.

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PORTER, Assignee, etc., v. KING and another.

(*District Court, W. D. Pennsylvania.* April 1, 1880.)

**MORTGAGE—ASSIGNEE—SECRET EQUITIES.**—The assignee of a mortgage takes it free and discharged from the secret equities of third persons.

In Equity.

ACHESON, J. This controversy concerns a bond, and mortgage securing the same, bearing date March 3, 1877, from Hamilton Lacock and wife to S. B. W. Gill, who was adjudicated a bankrupt, November 28, 1877. The bond is conditioned for the payment of the sum of \$5,200, in two years from date, with interest payable semi-annually. The mortgage is upon real estate in Allegheny City, and was recorded April 3, 1877, in Mortgage Book, vol. 225, p. 485. These securities were found by W. D. Porter, the assignee in bankruptcy of Gill, among the papers of the latter, and were taken possession of by the assignee. Rev. Matthew M. Pollock, one of the defendants, claims to be the assignee for value of \$1,000 of said mortgage, by an assignment from Gill dated April 9, 1877, and to enforce his claim instituted legal proceedings against the assignee in bankruptcy. The other defendant, William C. King, claims to be the purchaser and assignee for value of the whole of said bond and mortgage, by assignment from Gill, dated April 12, 1877, and to enforce

his claim filed a bill in this court against the assignee in bankruptcy.

The latter thereupon filed his bill in this case, praying, *inter alia*, that the defendants might interplead in respect to said bond and mortgage, and settle their conflicting claims. The defendants having severally answered the bill, there was a decree of interpleader and an issue was formed between them.

The case was eventually heard upon a master's report, and exceptions thereto, and the testimony taken by him.

The material facts are as follows: The bond and mortgage in question were given by Hamilton Lacock and wife to Gill, for money borrowed to pay off another mortgage against the Lacoeks, held by Mrs. Eliza Lewis. Prior to making the mortgage, Gill told Hamilton Lacock he was getting the money from King, and he informed him he had got it from King. Gill paid off the Lewis mortgage, and therefore there is no question as to the liability of Lacock and wife upon the mortgage, the subject of this controversy. This mortgage bears date March 3d, and was acknowledged March 8th, and was left for record April 3, 1877.

About March 13, 1877, the Rev. Matthew M. Pollock gave to Gill \$1,000, to be invested in a mortgage. No particular mortgage was then mentioned, but in a few days thereafter Pollock called on Gill for an assignment, when Gill said he would send it by mail, and mentioned the property the mortgage was on and its amount, which statements corresponded with the assignment afterwards sent to Pollock. On April 9, 1877, Gill mailed to Pollock, whose post-office address was Jolly, Ohio, a written assignment bearing that date, and executed under the hand and seal of Gill. This paper, after reciting a mortgage from Hamilton Lacock and wife to S. B. W. Gill, dated March 3, 1877, recorded in Mortgage Book, vol. 227, p. 151, for \$5,200, with a brief but correct description of the premises, assigns to Pollock "\$1,000 of the money secured by the above stated mortgage, with interest thereon from March 30, 1877." This assignment reached Pollock in due course of mail, to-wit, in about four days. He did not pro-

cure his assignment to be entered of record, nor did he give notice of it to the mortgagors. It was not until some considerable time after Gill had absconded, (which he did about September 17, 1877,) that the Lacoeks first heard of the assignment to Pollock.

On the twelfth day of April, 1877, Wm. C. King purchased from Gill the said bond and mortgage. The bond was then in Gill's hands. The mortgage he had left in the recorder's office for record on April 3, 1877. King paid Gill, for the bond and mortgage, \$4,800 or \$4,900 in cash, and upon the back of the bond Gill executed, under his hand and seal, an assignment to King, bearing date April 12, 1877, of "the within bond and all money secured thereby." There was nothing on the bond or mortgage to show any prior assignment, and King purchased the securities and paid the consideration therefor in good faith, and in entire ignorance of the assignment to Pollock. Shortly after his purchase King had the actual possession of both bond and mortgage, but, upon Gill's suggestion that he had a good safe in his office, and that it was convenient for him to collect the interest, King left the papers with him, taking the following receipt:

"Received from Mr. Wm. C. King, April 25, 1877, the bond and mortgage of H. Lacock and Martha, his wife, dated March 3, 1877, for five thousand two hundred dollars, for two years, interest payable semi-annually, which said mortgage and bond has been assigned to him. I am to hold the same for safe-keeping and collection of interest.

"S. B. W. GILL."

Gill also gave King (and he thinks at the same time he received the above receipt) the recorder's receipt, which then read as follows:

"RECORDER'S OFFICE, ALLEGHENY COUNTY,

"PITTSBURGH, April 3, 1877.

"Received the following for record: One mortgage from Hamilton Lacock to S. B. W. Gill. Assigned to W. C. King April 12, 1877. \$2.50 paid.

"R. J. RICHARDSON, Recorder."

From the statements in these receipts King supposed that Gill had made an assignment to him of the mortgage on the margin of the record; but, in fact, Gill did not assign the mortgage of record. This, however, was not discovered by King until after Gill had absconded. Within three days after Gill had left, King gave formal notice of his claim to Hamilton Lacock.

On September 11, 1877, Lacock paid Gill, for King, the first instalment of interest, for which Gill gave Lacock a receipt which states that the mortgage is "now held by Mr. Wm. C. King." This interest Gill paid over to King. S. B. W. Gill was a member of the Pittsburgh bar, and until he left, in September, 1877, his professional standing was good, and he possessed the confidence of the community.

I have been thus particular, in stating every fact which I regard as material, because I am constrained to dissent from the conclusion of the learned master in respect to the conflicting assignments to Pollock and King, which he thus states: "Neither of them being entered of record in the recorder's office, on the margin of the recorded mortgage, it is simply a question as to whose assignment was first delivered." And, treating the assignment to Pollock as delivered when it was deposited in the post-office on April 9, 1877, he reports a decree in his favor for the portion of the mortgage assigned to him. But the case, it seems to me, is not one for the application of the maxim, *qui prior est tempore potior est jure*. There are here other considerations besides that of time, which cannot be ignored if we would reach a just conclusion.

Mathew M. Pollock, it must be observed, parted with no money or other valuable thing upon the faith of the Lacock bond and mortgage. He had left in Gill's hands \$1,000, to be by him invested in a mortgage at his discretion; and not in this particular mortgage, which was not then so much as mentioned.

In confiding his money to Gill, Pollock, in the first instance, trusted exclusively to his personal responsibility and integrity. His subsequent arrangement with Gill, which the latter carried out, was for an assignment which was entirely inadequate for

his protection, as it left Gill in possession of the bond and mortgage, and in a position to deal as lawful owner of the same with innocent third persons. *Jeffers v. Gill, for use*, 8 W. N. C. 19; *Kellogg v. Smith*, 26 N. Y. 18. It is said in *Jones on Mortgages*, (vol. 1, § 476,) that, except under peculiar circumstances, a person acting in good faith would not take a mere written transfer of the mortgage title without a delivery of the mortgage itself, and the note or bond secured thereby. Now, the actual good faith of Mr. Pollock is not open to question. But, unfortunately for him, he accepted such an assignment as no ordinarily prudent man would have taken; and it must be remembered that in his previous interview with Gill this manifestly was the kind of assignment which Gill proposed to mail to Pollock, and which the latter then impliedly agreed to accept.

After receiving his assignment he did absolutely nothing to make it efficient. He took no steps to have it made matter of record, or noted upon the original papers, and he did not even give the mortgagors notice. Had he given seasonable notice to Hamilton Lacock, it is highly probable that the double assignment would have been discovered in time to frustrate Gill's fraud and prevent this loss; for Lacock had contemporaneous information from Gill that King had advanced the money on the bond and mortgage.

William C. King, as we have seen, found the bond in Gill's hands, and the mortgage, if not in his actual possession, in the recorder's office, under his control, with nothing appearing upon either instrument to indicate any prior assignment. On the faith of the securities, without notice or means of knowledge of the assignment to Pollock, he made the purchase in perfect good faith, paying a full consideration. He immediately took the wise precaution of having the assignment to him put upon the back of the bond. He supposed, and from the receipts which Gill delivered to him he had good right to believe, that a proper assignment of the mortgage had been made on the margin of the record, in the customary way. But without such assignment the title to the mortgage passed to and vested in him; for it is firmly settled that the debt

is the principal, and the mortgage a mere security, appurtenant and secondary; and that the assignment of the bond, secured by a mortgage, carries with it the mortgage. *Kellogg v. Smith, supra*; *Carpenter v. Longam*, 16 Wall. 275.

Did King take subject to the secret claim of Pollock? This question, in my judgment, must be answered in the negative, both upon authority and principle. It has more than once been held in Pennsylvania that while the assignee of a mortgage takes it subject to the equities of the mortgagor, he takes it free and discharged of the secret equities of third persons. *Mott v. Clark*, 9 Barr, 399; *Prior v. Wood*, 7 Casey, 142; *Wetherill's Appeal*, 3 Grant, 281; *Jeffers v. Gill, for use, supra*. The same doctrine has been applied to the assignees of choses in action generally. *Fisher v. Knox*, 1 Harris, 622; *Hendrickson's Appeal*, 12 Harris, 363; *Redfearn v. Ferrier*, 1 Dow. (House of Lords Cases,) 50.

In this latter case Lord Eldon, treating of secret equities of third persons, and speaking of the assignment of backbonds, said: "He had looked very anxiously and carefully to see whether there were any cases where latent equities had prevailed against intimated assignations, [assignments with notice to the debtors,] and he had found none." *Id.* 72. Again, he said: "If latent equities were permitted to prevail against assignations, the effect would be that nothing could ever be assigned." *Id.* 72.

Several of the above cases are cited with approbation in *Wetherill's Appeal, supra*, by Mr. Justice Strong, who, after a review of the authorities, says: "This is sufficient to indicate, if it does not fully determine, that the rule is that the purchaser for value of a chose in action is not to be affected by the latent equities of third persons. He is only bound to inquire of the debtor, and there is much reason for such rule. Secret equities in third persons are clogs upon alienation, and cannot, therefore, be favorites in law. The holder of them virtually empowers the creditor to practice a fraud upon the innocent—a fraud against which no vigilance can guard." 3 Grant, 287.

As already observed, the previous arrangement between

Gill and Pollock, in respect to the assignment to the latter, contemplated that it should be a separate written transfer, and that the securities themselves should be retained by Gill; and this arrangement was carried out. Thus was Gill allowed by Pollock to remain the apparent owner of the entire securities. It seems to me, therefore, that the case falls clearly within the principle that when one of two innocent persons must suffer, he must bear the burden or loss whose act or neglect has been the occasion of the suffering. *Wetherill's Appeal, supra; Jeffers v. Gill, for use, supra; Penn. R. Co.'s Appeal, 5 Norris, 80.*

Let a decree be drawn in favor of William C. King, in the issue between him and Matthew M. Pollock, and directing that W. D. Porter, the assignee in bankruptcy of S. W. B. Gill, deliver to said William C. King the said bond and mortgage, and duly assign to him of record the said mortgage.

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SHAW and others v. THE SCOTTISH COMMERCIAL INSURANCE COMPANY.

(Circuit Court, D. Maine. ———, 1880.)

**INSURANCE—FALSE STATEMENT—FRAUD.**—A mere wilfully false statement will not work a forfeiture of a policy of insurance, under a condition that "all fraud or attempt at fraud, by false swearing or otherwise," should cause such forfeiture, when such false statement could not deceive the insurance company to its injury.

**TRIAL—PROOFS OF LOSS—OMISSION TO CHARGE.**—The omission to charge that the proofs of loss were not evidence of value, although requested by the defendant, did not constitute an error under the circumstances of this case.

LOWELL, J. One Clement insured a stock of goods in the defendant company for \$4,500, and it was consumed by fire. The value of the whole stock had been stated to a sub-agent of the defendants, when the insurance was effected, at \$8,000, but no issue was raised concerning this representation. As part of the preliminary proof of loss, a sworn



schedule was furnished by Clement, in accordance with the conditions of the policy, in which the goods lost were valued at \$6,500. He also submitted to an examination on oath by an agent of the defendants, as required by the contract. There was evidence tending to show that some of his statements in the schedule and examination—but more especially in the former—were false, though it was not admitted or directly proved that they were wilfully so. The insured became bankrupt after this, and the action was prosecuted by his assignees, and resulted in a verdict for the plaintiffs. One point of law reserved at the trial has been argued with so much zeal and ability, and is thought by the defendants to be of so great importance, that I have examined it with care, and shall give my views upon it at more length than its intrinsic difficulty may seem to require.

There is a preliminary matter, which I will first dispose of. The proofs of loss, including the schedule above mentioned, were put into the case by the plaintiffs with the express avowal that they were offered and used merely to prove that the proofs had been duly made. The witnesses who made the schedule had it before them when they testified, and many questions were asked them by both sides as to how it was made up, etc. The paper itself was not referred to by counsel on either side, nor by the court, as evidence of value. The defendants asked me, in writing, to instruct the jury that the paper was not evidence of value. I neglected, by inadvertence, to give this ruling, and this is the first ground upon which a new trial is asked for. Inasmuch as not a word had been said throughout the trial which would lead the jury to suppose that the proofs of loss were evidence of value, but the value was most elaborately argued on both sides on wholly different grounds, and as the proposed instruction was not read in the presence of the jury, so that my silence could not have misled them, I think there was no error in this omission. The supreme court of Maine have decided that, where such a paper is put in without objection, it is evidence for all purposes; but I need not consider that point. *Moore v. Providence Ins. Co.* 29 Maine, 97.

The main question of the case arises upon this clause among the conditions in the policy: "All fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy." The instruction desired by the defendants was that this condition had the same meaning as one which is often inserted in policies, that any fraud or false swearing shall defeat the claim, and that, under either of these stipulations, a wilfully false oath to a material fact would work a forfeiture of the whole claim.

I gave an instruction that any fraud, or attempt at fraud, however committed, and however small in amount, whether by a false oath or otherwise, would have the effect contended for; but not a false statement, though wilful, by which the company could not be defrauded. The example which I gave of an attempt at fraud was that the plaintiffs should attempt to recover more than was due. I defined a fraud to be the deception of a person to his injury, and an attempt at fraud to be an attempt to deceive a person to his injury; so that I, in effect, required the jury to find an attempted injury, as well as a false statement, if they should find for the defendants on this point.

The insured was the principal witness for the plaintiffs, and he was contradicted in several particulars; and I gave the jury full opportunity to reject his evidence altogether, if they found him to be a perjured witness, or to infer from the whole testimony that he was attempting an actual fraud. Their finding, upon a matter so peculiarly within their province, I did not feel at liberty to set aside.

The particular misstatements which Clement was said to have made in his schedule of loss were very far below the amounts which would be necessary to operate an injury upon the defendants, by causing them to pay more than was due, and very much less than overestimates, which the courts have repeatedly held not to be in themselves sufficient evidence of wilful misstatement to set aside a verdict, even when false swearing was a substantive defence, and when the overestimate tended directly to injure the defendants. It became very important, therefore, for the defendants to put a con-

struction upon the policy which would render any wilfully false statement fatal; and the question is whether that is the sound construction.

In construing a contract, the first and by far the most important witness is the English language. Adjudged cases, which resemble the case at bar to a greater or less extent, cannot often supply the place of the universal and overruling precedent of the common usage of mankind in their daily speech, excepting as they explain terms which have acquired a technical meaning. The only technical word in the condition under examination is fraud; and the authorities are entirely agreed that the word means, in law, what I ruled it to mean. Not that it may not be often used *obiter*, so to speak, in a more loose and general sense, but whenever it needs to be defined, and a case depends upon it, that is its meaning, and, so far as I know, without exception. I understand, therefore, the phrase "fraud" or "attempt at fraud," by false swearing or otherwise, to mean an injury or attempted injury of the defendants, by immoral means, such as false swearing, that being one instance or example of many possible means.

The defendants contend that the phrase makes all false swearing to be a fraud, or an attempt at fraud, so that it would read: "All false swearing or other fraud or attempt at fraud;" but this is a forced and non-natural construction, because it requires not only a transposition of the words, but also a change of the usual meaning of one of them.

The ruling also comports with the general law of insurance, which holds the insured to a rigid line of fair dealing, and gives the underwriter an advantage not given to the parties to most contracts, in that it defeats an honest claim if it has been dishonestly exaggerated. To go further would be to make a law beyond the general law of the land, and beyond the usual meaning of the words of the contract, besides committing the injustice of visiting a crime against morals only with a forfeiture of property in favor of one who could not have been injured by it. To give to the word "fraud" a loose and latitudinarian meaning is inadmissible in such a case.

A safe test of an attempt at fraud is to inquire whether, if it had succeeded, the person who had paid money in consequence of it could recover back the money. No one would contend, I suppose, that these defendants, if they had paid the \$4,500, could have successfully maintained an action to recover it back, upon proof that the schedule had exaggerated the loss, which, however, was much greater than \$4,500.

Most of the cases which I have seen, including those cited in the briefs, appear to be cases where the *claim* was exaggerated, and, therefore, where every dollar that was falsely added tended directly to defraud the underwriter. For instance, in *Geib v. Ins. Co.* 1 Dillon, 443, the charge was: "If you find from the evidence that the plaintiff, in the proofs of loss, knowingly and falsely made a fraudulent overvaluation of the property with a view to deceive the insurance company, and to induce them to pay more than the value of the building, then he cannot recover." In a case in this court a verdict was rendered for the defendants and sustained upon proof of a wilful misstatement of about one dollar in an insurance of several hundreds, where the dollar was part of the claim of loss. The rulings in all the following cases, from some of which general remarks concerning the good faith required of the assured are cited in the defendants' brief, will be found, when carefully examined, to relate to an overvaluation of the same character. *Huchberger v. Home Ins. Co.*, 5 Biss. 106; *Howell v. Hartford Ins. Co.* 3 Ins. L. J. 659; *Haigh v. De La Cour*, 3 Camp. 319; *Levi v. Baillie*, 7 Bing. 349; *Chapman v. Pole*, 22 L. T. N. S. 306; *Goulstone v. Royal Ins. Co.* 1 F. & F. 276; *Britton v. Royal Ins. Co.* 4 F. & F. 905.

A more common form of condition than that used in this policy is that any fraud or false swearing shall destroy the claim. The courts hold that this means wilfully false swearing in some material particular, and they sometimes speak of it as fraudulently false swearing; and the defendants insist that this ruling makes fraud and false swearing identical in insurance cases. But it is plain that if the parties

choose to contract that any wilfully false swearing to a material fact shall defeat the claim, the courts may hold them to their agreement without a violation of principle, and may, perhaps, look to the policy as a whole, to ascertain what the parties consider a material fact.

There are a few cases in which perjury in respect to facts required to be disclosed, such as title, etc., has been held to work a forfeiture, under the contract of the parties, although no court or jury could have said that any attempt to defraud the company had been made. If the courts have used the word "fraudulent" in qualifying such a statement, they must be understood by the context as using the word, in a somewhat loose sense, for dishonesty, in a material particular, without intending to change the definition of fraud, which did not enter into the question. I do not know whether there are many such cases. Even in construing this broad condition, the distinction between perjury and fraud has sometimes been insisted on, as in *Marion v. Great Republic Ins. Co.* 35 Mo. 148. I do not think it necessary to inquire whether the preponderance of authority is one way or the other on this point, when there is a distinct stipulation against false swearing.

Two cases are cited by the defendants as laying down the rule which they say should govern this case. In *Park v. Phoenix Ins. Co.* 19 Q. B. (Upper Canada,) 110, £2,500 were underwritten on buildings and machinery by the defendants and others who were to contribute, and the loss was sworn at £3,750. The condition of the policy avoided the claim, "if there appears any fraud, overcharge, or imposition, or any false swearing." Page 119. The sixth plea averred an "overcharge," in that £3,750 was said to be the loss, when in truth it was but £1,500. The seventh plea averred fraud in this: that, with the intent to impose on the defendants and procure them to pay more than the loss, which was £1,500, they delivered a false and fraudulent account. The eighth plea set up false swearing in stating the loss at £3,750, when it was only £1,500. The chief justice charged the jury that, in order to defend successfully under either the sixth or sev-

enth plea, "it was necessary to prove that there was a designed overvaluing, with a view to obtaining a larger sum than the actual amount of the loss sustained would enable the party to recover;" and "reminded" them "that there was really no ground for supposing that the plaintiff or Beemer intended, by overvaluing the property, to obtain more than the actual amount of the loss, unless it was clear that such actual loss was less in amount than the £2,500 insured." He added the remark, relied on by the defendants, "that where the insured in any such case named a larger sum as his loss than it really amounted to, it might have the effect of leading the insurers to be less careful in inquiring into the fact than they otherwise would have been, and that a designed misstatement, with such a view, would, of course, be fraudulent."

The defendants understand the learned judge to charge, in this last sentence, that a false statement, with a view to induce the insurers to be less careful in investigating the loss, would be a fraud; when he had just before charged that there could be no fraud unless the loss was less than the amount insured. If this were his meaning it would be impossible to reconcile the contradictions of the charge. The policy provided against fraud and false swearing as two distinct things, and I understand him to say that there could be no overcharge or fraud under pleas 6 and 7, unless the loss were less than the sum insured; but that there might be false swearing under plea 8, if an intentional falsehood was sworn to with intent to prevent investigation. I do not mean to say that this is very clearly expressed, but it is the fair construction, and the only one which makes the ruling intelligible, or which is consistent with the pleas, which do not charge fraud excepting as thus understood. So, in *Seghetti v. Queen Ins. Co.* 10 Low. Can. Jur. 243, the condition was against fraud or false statement, and the pleas were—*First*, fraud in stating the loss at £2,129.77, when it was only £500, (£800 having been insured;) *second*, a false statement by the insured.

The other case is *Sleeper v. New Hampshire Ins. Co.* 36 N.

H. 401, where the insurance was \$600, and the plaintiff swore to a loss of \$1,000. A referee found that the insured believed himself to have lost \$600, but not \$1,000, and that his motive for the falsehood probably was to obtain a speedy settlement. Two of the three learned judges held that this was an attempt at fraud under a clause exactly like that now in question. With unfeigned respect for the opinion of a very able and learned court, I think they permitted an abhorrence of falsehood to induce them to give to the word "fraud" a meaning beyond its true and legal meaning. I am unable to see that it is a fraud to induce one to pay a just debt by immoral means. Falsehood is bad, but so is injustice, and it is not just to deprive a perjurer of his property merely because he is a perjurer. "It is not indictable," says Mr. Bishop, "to induce one, by lying representations, to pay a debt he justly owes, because he is not thereby legally injured." Bishop Crim. Law, § 525. That is, because fraud imports an injury, and perjury does not.

There must be judgment on the verdict.

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**BARTLETT, REID & Co. v. TEAH and others.**

*(Circuit Court, E. D. Arkansas. —, 1880.)*

**MORTGAGE—SPECIFIC LIEN—EQUITABLE TITLE OF GRANTOR.**—A mortgage, or deed of trust in the nature of a mortgage, creates a specific lien, and is, in effect, a security for a debt, and not an absolute conveyance of the property. The equitable title remains in the grantor, and may be sold or encumbered by him, or seized and sold by his creditors, subject to the prior lien of the mortgage or deed of trust.

**ASSIGNMENT FOR BENEFIT OF CREDITORS—ABSOLUTE TITLE PASSED.**—A voluntary assignment of property by a debtor, for the benefit of his creditors, does not operate by way of security for the debts, nor create a lien on the property, but passes the absolute title, legal and equitable, to the assignee, for the purpose of raising a fund to pay debts; and, as against the assignee and those holding under him, the debtor has no estate or interest in the property, legal or equitable, which he can convey or encumber, or which his creditors can seize, or sell, or establish a lien upon, until the purposes of the trust are satisfied.

**ASSIGNEE—ATTACHING CREDITORS—REV. ST. OF ARK. § 385.**—Under section 385 of the Revised Statutes of Arkansas, an assignee does not acquire title to the property assigned, as against attaching creditors of the assignor, until he files the inventory and gives the bond required by that section; and, until the inventory is filed and the bond given, the assignee cannot lawfully take possession of the property.

**DEED OF ASSIGNMENT IN CONTRAVENTION OF REV. ST. OF ARK. § 387.**—

A deed of assignment that directs the assignees to sell the property (a stock of goods) in the ordinary course of trade, at private sale, for 12 months, and that, in terms or by necessary implication, forbids a sale at public auction until after the expiration of that period, is in contravention of section 387 of the Revised Statutes, and renders the deed void.

The plaintiffs sued out a writ of attachment, and caused it to be levied upon a stock of goods as the property of the defendant Amanda Teah. Edward Hunt and Abram Teah intervened in the suit, and filed their petition, claiming the property attached under an instrument claimed by them to be a mortgage, or deed of trust in the nature of a mortgage. After reciting the names of the creditors, and the amount of their respective debts, it conveys the property, in apt words, absolutely to the assignees in trust, for the purpose of securing numerous creditors named in the full payment of their several debts, and for that purpose the assignees are empowered to take immediate possession of the property, and sell the same at private sale, in the usual course of trade, and with the proceeds pay the creditors mentioned; and, if the debts are not satisfied at the end of 12 months after the date of the assignment, the assignees are directed to sell the property remaining on hand at public auction, upon 10 days' notice. The assignees are to account to the assignor for any surplus remaining after satisfying in full the debts of the creditors named. There is no defeasance clause in the instrument. It was duly executed, acknowledged and recorded, and the assignees in possession of the goods under it before the levy of the writ of attachment. It affirmatively appears from the petition that the assignees have not filed an inventory, nor given bond as required by section 385, Gantt's Digest. The plaintiffs in the attachment demurred to the petition.

*Wm. Walker*, for assignees.

*Erb, Summerfield & Erb*, for attaching creditors.

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CALDWELL, J. The first question to be determined is the character of this instrument.

The interpleader maintains that it is a mortgage, or deed of trust in the nature of a mortgage, and the attaching creditor insists that it is an assignment for the benefit of creditors, and that, as such, its validity must be tested by the provisions of the statute of this state relating to such instruments.

A brief consideration of the purposes and legal effect of the several instruments mentioned will disclose to which class this instrument belongs. A mortgage does not invest the mortgagee with an absolute and indefeasible title; the equitable title, called the equity of redemption, remains in the mortgagor. The mortgage is a security for the debt, and creates a *lien* upon the property in favor of the creditor. There is no difference in legal effect between a mortgage with a power of sale and a deed of trust, executed to secure a debt, where the power of sale is placed in a third person. Both are *securities* for a debt; both create *specific liens* on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the *lien* created by the mortgage or deed of trust. Burrill on Assignments, § 6; *Turner v. Watkins*, 31 Ark. 429, 437; Dillon's Monograph on Deeds of Trust, 11 Am. Law Register, (N. S. 1863,) 648.

An assignment for the benefit of creditors is well defined to be "a transfer by a debtor of some or all of his property to an assignee in trust, to apply the same, or the proceeds thereof, to the payment of some or all of his debts, and to return the surplus, if any, to the debtor." Burrill on Assignment, § 2. The terms of the instrument in this case bring it exactly within this definition, and stamp it as an assignment for the benefit of creditors and not a mortgage, or deed of trust in the nature of a mortgage. Unlike a mortgage or deed of trust, it was not given by way of *security*. There is no defeasance clause giving the grantor the right of redemption; it does not create a lien on the property, but conveys it

absolutely for the purpose of raising a fund to pay debts; and, if valid, it passed the absolute title, legal and equitable, to the grantors in the deed, subject to the trust, and placed the same beyond the reach of the debtor, as well as her creditors, until the purposes of the trust were satisfied. When the debts were paid the debtor had a right to the surplus, but until that was done she had no legal or equitable interest in the property, or its proceeds, that could be sold or encumbered or seized on attachment or execution by her creditors. *Briggs v. Davis*, 21 N. Y. 577; *Hoffman v. Mackall*, 5 Ohio St. 124; *Crittenden v. Johnson*, 11 Ark. 94; *Pettit v. Johnson*, 15 Ark. 55; *Turner v. Watkins*, 31 Ark. 437.

Is the instrument valid as an assignment for the benefit of creditors? For a long period in this state there was no statute limiting or regulating the common law rights of a debtor to convey his property to an assignee for the payment of his debts. It is well known that in many cases where debtors resorted to this mode of shielding their property from judicial process, they made choice of an insolvent friend or relation for assignee, who would administer the trust in the interest of the debtor; and not having to file any inventory and appraisalment of the property assigned, or give bond for the faithful execution of the trust, the result was that the property was appropriated by the assignee for his own and the debtor's use, and it was rare that creditors received anything from the trust. Under that system it would have been more appropriate to designate the transaction as an assignment for the benefit of the debtor and his assignee, and to defraud creditors, than as an assignment for the benefit of creditors.

Of course, it was open to creditors to invoke the aid of a court of equity to remove such an assignee and appoint some suitable person to execute the trust, but it often happened that before creditors, who usually resided at a distance, could be sufficiently advised, and concert measures for their protection through the court of chancery, that the assignee had placed the property and its proceeds beyond their reach. And where that was not the case, and the creditors succeeded in getting rid of the debtor's assignee and having a receiver

appointed, the costs incurred in the litigation that had to be gone through with to attain that end usually consumed the estate.

To put an end to such fraudulent practices the act of 1859, sections 385, 387, Gantt's Digest, was passed. It was the design of that act to cut up by the roots the evils of the former practice. The legislative intent to accomplish this purpose is not left to implication, but is expressed in plain and unmistakable language. The first section of the act declares that "in all cases in which any person shall make an assignment of any property, whether real, personal, mixed, or choses in action, for the payment of debts, *before* the assignee thereof shall be entitled to take possession, sell, or in any way manage or control any property so assigned, he shall be required to file in the office of the county clerk a full and complete inventory and description of the property, and execute a bond to the state in double the value of the property, with good securities, to be approved by the county judge."

Under this section three things are necessary to a complete and valid assignment—*First*, a deed of assignment; *second*, an inventory of the property filed with the county clerk; and, *third*, the execution of an approved bond by the assignee. All these must be done "*before*" the assignee acquires the legal title to the property; they are conditions precedent, made so by the express language of the statute.

One who by law has no right to the possession of personal property, and no right to sell or in any way manage or control it, has no title to it. This language in the act, *ex vi termini*, imports a want of title, and is legally equivalent to a declaration that, before the title to the property shall vest in the assignee, he shall file the inventory and give the bond required by the act.

The assignee is not required to prepare the inventory, but to "file it in the clerk's office;" he does not make it and cannot do so, because he is denied the possession of the property until the inventory is filed. It is the duty of the debtor making the assignment to prepare the inventory; it is a material, and, under the statute of this state, an indispensable,

part of the assignment. There is not a word in the statute countenancing the suggestion that the assignee is required to make the inventory. This would be to reverse the necessary and uniform order of doing business; it is the vendor of goods who makes the invoice and not the vendee.

The assignee, in a voluntary deed of assignment to pay creditors, is not a purchaser for value; he has none of the equities of such a purchaser, and in a court of law he must stand on his naked legal title, which he can only acquire in the mode prescribed by the statute. And what can be more reasonable and just than the requirements that such an assignee shall, for the protection and security of the debtor's creditors, place upon record evidence of the character, quantity, and value of the property assigned, and give a sufficient bond to account therefor; and that he shall not be invested with the title to the property until these things are done? And if a debtor desires, by an assignment, to place his property beyond the reach of judicial process, at the suit of his creditors, is it not just and reasonable that he should be required, as a condition precedent to the effectiveness of such an assignment, to see to it that the assignee he himself has chosen files the inventory and gives the bond required by law for the protection of creditors? Such must be his duty under a statute like that in this state, which leaves the property in his possession until the inventory is filed and bond given, otherwise it would be to his interest to select an assignee who either could not or would not give a bond.

It is believed the statute of this state is more peremptory and stringent in its provisions on this subject than the statute of any other state. No other statute has been brought to our attention that in terms prohibits the assignee from taking possession of the property until he files the inventory and gives the bond. In most of the states he may lawfully take possession of the property, and time is given to file the inventory and give bond. This was the law in New York, and the court of appeals of that state held that, if the inventory and bond were not filed within the time required by the statute, the assignee, though in possession under the deed of assign-

ment, acquired only an inchoate title, that was void as against an attaching creditor of the assignor. The court say the schedule required by the act to be made by the debtor within 20 days from the date of assignment is a necessary part of a valid assignment, and a prerequisite to vesting the title to the property in the assignee; and that the execution by the assignee of the bond required by the act is also a prerequisite to the acquisition of an absolute title by the assignee, and that until the inventory is filed and bond executed the property may lawfully be seized on attachment at the suit of the debtor's creditors. And the court say further that "assignors must see, in selecting assignees, that they will not only accept, but that they can and will give the bond required, and assignors must take care to complete the assignment by giving the necessary schedule." *Julian v. Rathbone*, 39 N. Y. 369. And see *Hadman v. Bowen*, Id. 196; *Britton v. Lorenz*, 45 N. Y. 51.

Confessedly, until the inventory is filed and bond given, the assignee is not entitled to the possession of the property, but the possession remains with the debtor. Now, if the deed of assignment, without more, passes the title and bars creditors from proceeding at law to subject the property to the payment of their debts, the property is placed in a novel predicament: the assignee cannot dispose of it in execution of the trust, nor can it be reached by proceedings against him, because neither the possession, nor rights of possession, nor disposition is in him; and creditors cannot reach it in the hands of the debtor, for though in his possession, the title is in his assignee, and he only holds it as a kind of bailee or trustee, until it shall please his assignee to file an inventory and give the required bond. This, in effect, is making the debtor his own trustee. Is this state of things to continue at the pleasure of the debtor and his assignee? If not, when and how is it to be terminated?

It is said creditors may resort to equity to enforce the trust. Without inquiring whether a bill would lie for that purpose, especially at the suit of a creditor excluded from all benefits under the assignment, it certainly is not their only

remedy. They have an undoubted right to pursue their legal remedies, unaffected by an assignment that is incomplete, or in violation of the statute.

Section 387 declares that the "assignee shall be required to sell all the property assigned to him for the payment of debts, at public auction, within 120 days after the execution of the bond required by this act, and shall give at least 30 days' notice of the time and place of such sale."

This deed of assignment, in terms or by necessary implication, requires the assignees to sell at private sale, in the usual course of trade, for 12 months, and after the expiration of that period they are authorized to sell at public auction, on 10 days' notice. This provision is in direct contravention of the statute, and renders the assignment void.

Demurrer sustained.

On a motion for rehearing, before a full bench, **McCRARY, C. J.**, concurred in the foregoing opinion.

NOTE.—See *Wright v. Thomas*, ante, 716.

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### THE PHOENIX INSURANCE Co. v. WULF and wife.

(Circuit Court, D. Indiana. February 2, 1880.)

**EQUITY PRACTICE—SERVICE OF SUBPŒNA—EQUITY RULE 13.**—The thirteenth equity rule, which declares that the service of all subpoenas shall be by a delivery of a copy thereof, by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member of or resident in the family, does not require the copy of the subpoena to be left with a person in the dwelling-house, but is satisfied by a service at the door, outside the dwelling-house.

**SAME—MARSHAL'S RETURN—AMENDMENT.**—Courts have the power to permit officers to amend their returns to both *mesne* and final process, and the power is exercised liberally in the interest of justice, especially when the rights of third parties are not to be affected by the amendment.

*McDonald & Butler*, for the marshal.

*Herod & Winter* and *Austin F. Denny*, for Bertha Wulf.

GRESHAM, J. The defendant Bertha Wulf owned certain real estate in Indianapolis which she conveyed, her husband joining, to a third person, who conveyed it back to her husband, Henry Wulf. The husband, the wife joining, then mortgaged the same property to the Phoenix Mutual Life Insurance Company to secure a loan. The mortgage showed upon its face that it was to secure a loan to the husband. The loan was not paid at maturity, and on the fifth day of December, 1876, the mortgage was foreclosed in this court. On the twelfth day of November, 1877, Bertha Wulf brought suit in this court to set aside her deed to the third party, his deed to her husband, and the mortgage of herself and husband to the insurance company, on the sole ground that she was a minor when she executed those instruments. The service in the foreclosure suit was after Bertha Wulf had attained her majority, and the decree against her was by default.

The marshal's return shows that the subpoena in the foreclosure suit was properly served on Henry Wulf, in compliance with equity rule 13. As to Bertha Wulf the return reads thus: "I served Bertha Wulf by leaving a copy for her with her husband." Some time after Bertha Wulf commenced her suit, as already stated, the marshal appeared and asked leave to amend his return so as to show that he had served the subpoena on Bertha Wulf by leaving a copy for her with an adult person, a member and resident of the family, to-wit: her husband, Henry Wulf, at her dwelling-house, or usual place of abode.

The defendant Henry Wulf occupied a building at the corner of Virginia avenue and Coburn street, in Indianapolis, both as a dwelling and a family grocery. In the lower story there were two rooms, the main room being occupied as a grocery, and the back smaller room for storage. These two rooms were separated by a hall, which was entered by a door from Coburn street, and also from Virginia avenue through the grocery. A stairway led from the hall to the second story, where the family dwelt, eating and sleeping. The hall and stairway were accessible in both ways, and were, in fact, approached in both ways. The deputy marshal found Wulf

in the grocery and there served the subpoena on him, and inquired for his wife, when the officer was informed that it was early in the morning and she was up stairs in bed, where the family lived. The officer then and there, in the grocery, handed to the husband a copy of the subpoena for his wife. Upon these facts was there a valid service on Bertha Wulf, under the thirteenth equity rule, which declares that the service of all subpoenas shall be by a delivery of a copy thereof, by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family? It is urged by counsel that the officer handed to Henry Wulf a copy of the subpoena when he was not "at the dwelling-house or usual place of abode;" that the grocery room was as distinct from the residence in the upper story as if the two had been in separate buildings, wide apart. That construction of the rule is narrow and unreasonable. It is conceded that if the officer had handed the copy to the husband in the hall the service would have been good, because the upper story was approached only through the hall, and it was therefore connected with the dwelling.

There were but two ways of ingress to the residence or upper story; one from Virginia avenue, through the grocery, and the other through the door opening from Coburn street. The family passed in and out both ways, as best suited their convenience. A copy was left with one who understood its contents, and was likely to deliver it to the person for whom it was intended. The case of *Kibbe v. Benson*, 17 Wall. 625, is cited against the sufficiency of the service. That was an action of ejectment in the circuit court of the United States, for the northern district of Illinois, which had adopted the statute of Illinois relating to actions of ejectment. After judgment was entered for the plaintiff by default, the defendant filed a bill in equity to set aside the judgment on the ground that he had no notice or knowledge of the pendency of the suit, and for fraud. The Illinois statute required that in actions of ejectment, when the premises were actually



occupied, the declaration should be served by delivering a copy thereof to the defendant named therein, who should be in the occupancy of the premises, or, if absent, by leaving the same with a white person of the family, of the age of 10 years or upwards, "at the dwelling-house of such defendant."

On the trial of the equity suit, one Turner swore that when he called at Benson's house, to serve upon him the declaration, he was informed by Benson's father that Benson was not at home, and that while the father was standing near the southeast corner of the yard adjoining the dwelling-house, and inside of the yard, and not over 125 feet from the dwelling-house, he handed him a copy of the declaration, explaining its nature, and requesting him to hand it to his son, after which the father threw the copy upon the ground, muttering some angry words. There was a conflict in the testimony, but the circuit court decided that even if the copy was handed to the father, as testified to by Turner, the service was not sufficient, and vacated and set aside the judgment which had been entered by default, and this decree was affirmed on appeal. In deciding the case the supreme court says: "It is not unreasonable to require that it [copy of the declaration] should be delivered on the steps, or on a portico, or in some outhouse adjoining to, or immediately connected with, the family mansion, where, if dropped or left, it would be likely to reach its destination. A distance of 125 feet, and in a corner of the yard, is not a compliance with the requirement."

Rule 13 must receive a reasonable construction. It does not require the copy of the subpoena to be left with a person in the dwelling-house; it is sufficient if the person who receives the copy is at the dwelling-house. The rule is satisfied by a service outside the dwelling-house, at the door, just as much as inside the house.

I think Bertha Wulf was in court when the decree of foreclosure was entered. This is not a motion to correct the pleadings, judgment or process. Courts have the power to permit officers to amend their returns to both *mesne* and final process, and the power is exercised liberally in the interest of justice, especially when the rights of third parties are not to

be affected by the amendment. In the exercise of a sound discretion they have allowed officers to amend their returns according to the real facts, after the lapse of several years, and when there is no doubt about the facts such amendments have been allowed after the officer's term has expired. *Adams v. Robinson*, 1 Pick. 461; *Johnson v. Day*, 17 Pick. 106; *People v. Ames*, 35 N. Y. 482; *Jackson v. O. & M. R.* 15 Ind. 192; *De Armand v. Adams*, 25 Ind. 455; Freeman on Executions, §§ 358, 359; Herman on Executions, § 248.

I think justice requires that the amendment should be allowed in this case.

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UNITED STATES v. CONNALLY.

(*District Court, D. Indiana. March 29, 1880.*)

**WRONGFULLY WITHHOLDING PENSION MONEY**—REV. ST. §§ 4766 AND 5485 CONSTRUED AND RECONCILED.—Section 4766 of the Revised Statutes, which declares that "hereafter no pension shall be paid to any person other than the pensioner entitled thereto," does not conflict with section 5485 of the Revised Statutes, which declares that any person "who shall wrongfully withhold from the pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, shall be deemed guilty of a high misdemeanor."

**CHARGE OF COURT—FORM OF QUESTION PUT TO JURY.**—Where there were two conflicting theories as to how defendant obtained possession of certain money, it was not outside the province of the court, in commenting upon the testimony, to ask the jury whether one theory was not the probable and natural theory rather than the other.

This case was argued by Mr. Holstein, district attorney, for the government, and Mr. George Butler for the defendant, it being submitted to both judges by agreement, though tried in the district court, in order to take the opinion of the circuit judge, who concurred with the district judge.

DRUMMOND, J. The defendant was tried before the district judge, on the indictment in this case, and found guilty on the second and third counts, and not guilty on the first, and a motion is now made for a new trial and in arrest of judgment.

The indictment is founded on section 5485 of the Revised Statutes.

The first count charges the defendant with wrongfully withholding from one Andrew J. Henderson, a pensioner of the United States, certain moneys which came to the defendant as an agent and attorney of the said Henderson.

The second and third counts charge him with being instrumental in prosecuting the claim of Henderson for a pension, and, being so instrumental in the prosecution of the claim, withholding wrongfully from him certain moneys of the pensioner.

The first question made is as to the validity of the counts in the indictment upon which he was found guilty.

It is sufficient ordinarily, in cases of a misdemeanor, to allege the offence in the language of the statute; and to state that the defendant was instrumental in presenting the claim of Henderson for a pension, without setting forth the particular circumstances in which that instrumentality consisted, was all that was requisite in this case.

The main offence, if any, was in wrongfully withholding money from the pensioner. The law punishes a person because, being instrumental in the prosecution of a claim for a pension, he is presumed to have a special connection with the circumstances which constitute the gravamen of the charge. And it seems, for that reason, to declare that no person who has this connection with the prosecution of a claim shall be permitted unlawfully to withhold money from the pensioner.

There is another question in the case growing out of the legislation of congress as to the description of the offence. The thirteenth section of the act of July 4, 1864, declared that no agent or attorney should demand or receive any greater compensation than that prescribed in the act; and it also declared, in language somewhat similar to a portion of section 5485 of the Revised Statutes, that if an agent or attorney wrongfully withheld from a pensioner any part of a pension or claim allowed he was to be deemed guilty of a high misdemeanor, and punished as prescribed in the statute. It will be seen that in this section, while the "withholding" fol-

lows language referring to the receipt by the agent or attorney of a certain compensation, and therefore indicates the receipt before the withholding of money, yet it is by indirection only, or by implication, which seems to be true of the act of 1873 as well as section 5485 of the Revised Statutes.

The third section of the act of July 8, 1870, declared that thereafter no pension should be paid to any other person than the pensioner who was entitled to the same. This struck at the root of what was supposed to be an abuse under the previous legislation of congress. This was a direction to every officer of the government whose duty it was to pay a pension.

This is claimed to have an important bearing upon the thirteenth section of the act of 1864, by thus explicitly prohibiting the payment of money to any one but the pensioner himself; and, therefore, rendering apparently meaningless the latter clause of the thirteenth section of the act of 1864, in relation to the withholding of money.

In the case of the *United States v. Irvine*, 8 Otto, 450, the question was presented to the supreme court whether the act of 1870 repealed the thirteenth section of the act of 1864, and the court, referring to this point, says: "It is not easy to see, therefore, how an attorney is to get possession of the money, and how he can withhold it, or why there should be a law for punishing him for such withholding." "The argument," the court says, "is not without force; but, without deciding that point, we prefer to answer another question, which will decide the present case." The question which was presented there was, therefore, whether the act of 1870 necessarily repealed the act of 1864. The act of 1873 was not referred to, because the offence as charged was committed before the passage of that act. But here, with the act of 1870 in force, the act of the third of March, 1873, was passed, the thirty-first section of which declared that no agent or attorney, or other person instrumental in prosecuting any claim for pension or bounty land, should receive any other compensation for his services in prosecuting a claim than such as the commissioner of pensions should direct to be paid to him, not exceeding \$25. And then the language

of the section is substantially like that of section 5485 of the Revised Statutes, as it now stands, and under which this indictment was framed, viz.: "Any agent, attorney or other person, *instrumental* in prosecuting any claim for pension, \* \* \* who shall directly or indirectly contract for, demand or receive or *retain* any greater compensation for his services or instrumentality in prosecuting a claim for a pension than as provided," etc. It will be observed that the word *retain* is used, thus implying that there might be money of the pensioner in the hands of the agent or attorney or other person, notwithstanding the act of 1870 forbade payment to such agent, attorney or person. And then the section proceeds, the language used in section 31 of the act of 1873 and in section 5485 of the Revised Statutes being precisely the same: "Or who shall wrongfully withhold from the pensioner or the claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, he shall be deemed guilty of a high misdemeanor."

It was an act passed after the act of 1870 in which this language is used. The clause in section 3 of the act of 1870 is preserved in section 4766 of the Revised Statutes, which declares that "hereafter no pension shall be paid to any person other than the pensioner entitled thereto." So that both these parts of the Statutes of 1870 and 1873 are found in the Revised Statutes, and the question is whether they cannot stand together; whether, in other words, we can reject section 5485 of the Revised Statutes merely because it does not speak of the receipt of money by an agent, attorney or other person representing the pensioner, but merely mentions the withholding of the money from him. It seems to me that, taking all this legislation together, while it indicates, perhaps, not quite so much care as there ought to be in legislating at different times upon the same subject, still it is the duty of the court to harmonize this various legislation, and if practicable to reconcile one part with another. And it must be presumed, I think, the intention of congress was, by incorporating into the Revised Statutes a part of section 31 of the act of 1873, to declare that whenever a person was

instrumental in prosecuting the claim of the applicant for a pension, and being thus instrumental the money of the pensioner should come into his hands, and he should unlawfully withhold it from the pensioner, that it was to be an offence for which he was to be punished, notwithstanding the act of 1870, as incorporated in the Revised Statutes, section 4766, declares that the pension money shall be paid to no one else than the pensioner; and that, while this was the purpose of the law, it must also be presumed it was the intention, if under any circumstances while a person was instrumental in prosecuting a claim or a pension, and the money of a pensioner came into his hands and he unlawfully withheld it, he was to be subjected to punishment. To take any other view of the case would be to strike out of the Revised Statutes one of its sections obviously intended to be enforced.

There is said to be error by the court in the instructions given to the jury. In examining the instructions carefully I see no objection that could be made to them upon what I understand were the conceded facts of the case. There was a portion of the charge in which the court asked the jury whether it was not probable or not natural that a certain theory of the facts was the true one. And the question is, whether there is anything in this that could be properly said to withhold from the jury the right to determine absolutely the facts in the case. The way it was put was this: Referring to certain facts which were not disputed, the court said, "Bearing in mind that the defendant wanted more of the money than he was entitled to by law for any assistance rendered by him in the transaction, (the claim for pension,) and that he induced the pensioner to go all the way from the soldiers' home to Lafayette for the purpose of getting part of the money, as he says, in payment of his legal services in getting pensioner and his wife out of jail, and that the defendant and Orth went to Culver, where Orth got possession of the check, *is it not probable*," the court says, "that the defendant would get the money into his own hands and retain the amount that he wanted to keep, paying only the balance

over to the pensioner? *Is it not natural that the transaction should have been as Mrs. Henderson tells you it was?*" etc.

Now there were two theories, one on the part of the prosecution and the other on the part of the defence, as to how the defendant got possession of the money. And, in commenting upon the testimony bearing upon this point, the court asked whether one theory was not the probable or natural theory, rather than the other. The court made no assertion that it was, but merely put the question to the jury. There was no withholding from the jury its right to determine what the facts were. I cannot see that it was going outside of the province of the court to put it in this form. It might have been put in this way: "Which is the more probable or natural of these two theories (referring to the one and to the other) it is for you to say." I do not think, although it is put in a little different form, that the jury could have understood that they were deprived of the right to judge of the facts, or that they were unduly influenced by the court in determining, according to their own views of the facts, the truth of the case.

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### UNITED STATES v. BAUGH.

(*Circuit Court, E. D. Virginia.* January, 1880.)

**EMBEZZLEMENT—LETTER CONTAINING TREASURY NOTES—INFORMATION—REV. ST. § 5467.**—In a prosecution by information, under section 5467 of the Revised Statutes, for the embezzlement of a letter containing treasury notes, by a person in the employ of the postal service, it is not necessary to allege ownership of the notes in some person other than the accused, where the taking or stealing of the notes is alleged by way of description, for the purpose of bringing the offence fully within the terms of definition employed by the statute.

**SAME—"INFAMOUS CRIME"—AMENDMENT TO CONSTITUTION, ART. 5.**—This statutory offence is not an "infamous crime" within the meaning of the fifth amendment to the constitution, precluding a prosecution by information.

Motion in arrest of judgment, after verdict, upon prosecution by information for a violation of section 5467 of the Revised Statutes.

The information charged "that John G. Baugh, late of the city of Richmond, heretofore, to-wit, on the twenty-third day of November, A. D. 1879, at the said city of Richmond, within the said eastern district of Virginia, he, the said Baugh, then and there being a person employed in the postal service of the United States, to-wit, as a letter carrier at the post-office at the said city of Richmond, unlawfully did embezzle, secrete and destroy a certain letter addressed to Messrs. Cowardin & Ellyson, at Richmond aforesaid, and which said letter was then and there in the said post-office, and was intended to be conveyed by mail, and then and there had not been delivered to the said persons to whom it was addressed, and which said letter then and there came into the possession of him, the said Baugh, and which said letter then and there contained certain articles of value, to-wit, two legal tender treasury notes of the United States, each of the denomination of one dollar, and each of the value of one dollar, and the said treasury notes the said Baugh did then and there take from the said letter, and did then and there take and steal the same, against the form of the statute in such case made and provided, and against the peace and dignity of the United States."

*L. L. Lewis*, District Attorney, for the United States.

*A. M. Keiley*, for accused.

HUGHES, J. This is an information for the embezzlement of a letter. The offence is statutory, and the information must charge such an offence as the statute defines. It is not the taking and secreting of *any* letter that constitutes the statutory crime. Under the terms of this law, that only is embezzlement where the letter is in postal custody; is not yet delivered to the person to whom it is addressed; contains some one of the valuable things named in the statute; and this valuable thing is taken out of the letter or stolen. This same section of the Revised Statutes also makes the act of taking this valuable thing out of the letter, or stealing it, an offence. In the case of the *U. S. v. Taglor*, 1 Hughes, 514, I held that there might be a prosecution for taking or  
v.1,no.10—50



stealing a valuable thing out of a letter in postal custody, and also a prosecution for embezzling the letter itself—two prosecutions in respect to the same letter, either against the same person, or against one person for embezzling the letter, and against another person for taking the valuable thing out of it, or stealing that thing, if the facts should justify the two proceedings. If prosecuting for the embezzlement, the pleader would allege the stealing by way of description only. If prosecuting for the taking or stealing, he would allege the embezzlement of the letter by the accused or some other person merely by way of description.

In the case at bar the government prosecutes only for the embezzlement of the letter, and alleges the stealing or taking of its contents only by way of description. Accordingly, the information, after charging the embezzlement, goes on by words of description to set forth that the letter was such as is defined by the statute; and, amongst other things, that it contained two treasury notes, and that these notes were taken out of the letter and stolen. These latter words are not employed in the technical form usual in charging a larceny, because the information is not for the offence of larceny, but distinctly and only for that of embezzlement; and the taking or stealing of the notes is alleged by way of description for the purpose of bringing the offence fully within the terms of definition employed by the statute. If it were, indeed, an information for the common law offence of larceny, (an offence rarely prosecuted in the United States courts,) then it would, no doubt, be defective in not alleging an adverse ownership of the two treasury notes in some person other than the accused.

Having premised this much, I come now to consider particularly the grounds on which the motion in arrest of judgment is founded.

1. It being an information for embezzlement, this offence does not fall within the provisions of the fifth amendment to the national constitution.

It has been often held that when terms of the criminal law are used in that constitution they are intended in their

technical sense, and not in the latitudinous sense which may be given them in proper perlanee.

The term *infamous* there used is a term of the law, and is to be construed as such with technical precision.

As the offence charged is not *treason*, and is not expressly declared by act of congress to be a *felony*, it is a misdemeanor. It may, therefore, be tried on information, unless it is of that class of misdemeanors which fall within the designation of *crimen falsi*.

The charge is for embezzling a letter containing money, and a conviction for embezzlement has never been held to render the party convicted *incompetent to testify*, which is the test by which the character of an offence may be determined to be or not *crimen falsi*.

In the case of the *U. S. v. Lancaster*, 2 McLean, it was decided that all offences under the post-office laws are *misdemeanors*. If, then, embezzlement is not an *infamous* offence, the offence charged in this information is clearly not infamous. Moreover, as it is not charged or averred in the information that the letter embezzled went into the defendant's possession by virtue of his employment, the offence as set forth in the heading does not even involve a breach of trust.

It has of late years been so often held by this and other federal courts that offences not infamous may be tried on information, that I hardly deem it necessary to refer to the decisions. Judge Dillon has so decided in *U. S. v. Maxwell*, a case which has frequently been quoted and relied on in this court. See 21 Int. Rev. Rec. 148; see, also, *U. S. v. Shepherd*, 1 Abb. U. S. Rep. 432. In the case of the *U. S. v. Henry Miller* it was so decided by this court. That case was much stronger than this, because the offence could much more appropriately be regarded as *crimen falsi*. In that case the charge was of *conspiring to defraud* the United States. The defendant was tried at Norfolk, convicted, and sentenced to the penitentiary.

Under the federal law it is not the mode or measure of the punishment prescribed that determines the character of offences, as is the case under the statute of Virginia. Hence

much of the confusion which exists in the minds of many of our best lawyers upon the question now raised in this case.

By the Virginia statute, all offences are declared to be felonious which are punishable capitally, or by confinement in the penitentiary; and if this statute prescribed a rule of decision for the federal courts in the state when trying criminal offences against the United States, there is no doubt that the defendant at bar could be tried for his offence only upon an indictment, inasmuch as the offence is punishable by *hard labor*, which is not necessarily, but is generally, a species of punishment inflicted only in a penitentiary. But this state statute does not apply at all in the federal courts in criminal trials. The rules for our procedure in such cases are derived from the common law. See *U. S. v. Reid*, 12 How. 361.

Under the federal laws, nothing is felony unless expressly so declared to be by congress, with exception of capital offences. And it has always been the policy of congress to avoid, as much as possible, the multiplication of statutory felonies. See 1 Greenleaf on Evidence, § 373; and 1 Whar. Crim. Law, § 760.

I may add that informations are never brought in this court except after formal complaint under oath, and full examination before a commissioner of the court wherein the witnesses testify while confronted by the accused; nor are they filed except by leave of court. In the case at bar the information was filed upon motion for leave to do so, in the presence of the accused and his counsel, without objection on their part or offer to show cause to the contrary.

On the whole, therefore, I must overrule the objection in arrest of judgment founded upon the fifth article of the amendments to the constitution.

2. I have already virtually disposed of the second objection, viz., that this is an information charging larceny, and, for that reason, is defective in not charging ownership of the treasury notes in some person other than the accused. I have already shown that this is a prosecution for the embezzlement of a letter, and that one of the ingredients of the

offence is that the letter must have contained some one of the valuable things mentioned in section 5487, which valuable thing (treasury notes here) shall have been taken out of, or stolen from, the letter. The taking of the notes out of the letter was one of the incidents attending the offence of embezzlement, and was alleged by the pleader only as such. It was not necessary to such a purpose to allege an ownership of the two notes.

The motion in arrest of judgment is denied.

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SHELDON and others v. KEOKUK NORTHERN LINE PACKET Co.  
and others.

(Circuit Court, W. D. Wisconsin. ———, 1880.)

REMOVAL OF CAUSE—SEVERAL CONTROVERSIES IN SAME SUIT—ACT OF MARCH 3, 1875.—Under the second section of the act of March 3, 1875, (c. 137,) a suit may be removed from the state court into the circuit court of the United States for the proper district, when there are several controversies in the same suit that are properly severable in their character, on the application of any one or more plaintiffs or defendants actually interested in any one of such controversies, and who may reside in a state other than the one in which the other party to the controversy resides, although, in such suit, the court may thereby take along with it jurisdiction of a controversy between citizens of the same state.

BUNN, J. This action is commenced in the state court by the plaintiffs, who are residents of Wisconsin, against the Keokuk Northern Line Packet Company, a resident of Missouri, the Northwestern Union Packet Company, a resident of Iowa, and Peyton S. Davidson, a resident of Wisconsin. The defendant, the Keokuk Northern Line Packet Company, applies to have the case removed to this court under the second section of the act of congress, of March 3, 1875, (chapter 137, Laws 1875,) which is as follows:

"That any suit of a civil nature, at law or in equity, now pending, or hereafter brought, in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, \* \* \* in which there shall be a controversy

between citizens of different states, \* \* \* either party may remove said suit into the circuit court of the United States for the proper district. And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The suit is a creditor's bill brought to reach property in the hands of the Keokuk Northern Line Packet Company, and certain other property held by Peyton S. Davidson, to be applied in satisfaction of judgments separately obtained by the plaintiffs against the Northwestern Union Packet Company in 1873 and 1874. The complaint charges that in March, 1873, there was a fraudulent transfer made by the defendant, the Northwestern Union Packet Company, of all its steamboats, barges and other personal effects to the defendant, the Keokuk Northern Line Packet Company, which ought in equity to be now applied in satisfaction of the plaintiff's judgments. And, also, that about April 1, 1873, there was a fraudulent conveyance by the Northwestern Union Packet Company of certain lots and real estate, situate at La Crosse, to the defendant Peyton S. Davidson, which they are also entitled to have applied toward the payment of their said claims. The Northwestern Union Packet Company has not been doing business for many years, was not served with process, and makes no appearance. The Keokuk Northern Line Packet Company contends that there is a controversy between citizens of different states, and, also, that there is a controversy in the case that is wholly between it and the plaintiffs, who are citizens of the different states, and which can be fully determined as between them, within the meaning of section 2 of the act of 1875, so as to entitle it to a removal to this court.

The plaintiffs contend that the suit is one controversy, and that no removal can be allowed, because all of the defendants

are not non-residents of the state of Wisconsin, where the plaintiffs reside.

Upon a careful examination of the bill of complaint and of the removal statutes, I think the case comes within both the clauses of section 2 of the act of 1875. I have not come to this conclusion without hesitation, because the supreme court have not yet placed a construction upon the act, and because, according to the construction uniformly given to the original removal clause in the judiciary act of September 24, 1789, and subsequent acts amendatory thereof, there would be no right of removal in this case, for the reason that one of the defendants, Peyton S. Davidson, is a resident of the same state with the plaintiffs. Under that act the right of removal did not exist unless all of the defendants were residents of a state other than the one in which the plaintiffs resided, and it is contended that the same construction is applicable to the law of 1875. But it cannot fail to be observed that the law of 1875 adopts the language of the constitution as though it were the intention of congress to widen out the jurisdiction of the circuit court in removal cases, and make it commensurate with that conferred by that instrument.

The law of 1789 provided that if a suit be commenced in any state court \* \* \* by a citizen of the state in which the suit was brought, against the citizen of another state, the defendant might file a petition for removal, etc.

It is manifest that the jurisdiction thus conferred falls far short of the constitutional provision, which extends the jurisdiction of the federal courts to all controversies between citizens of different states, where the amount or value in dispute exceeds the sum of \$500, thus leaving a large reserve of power in the federal courts, which could not be exercised without further legislation by congress. The law of July 27, 1866, provided for a removal on application of a defendant who was a citizen of a state other than the one in which the plaintiff resided, where the suit was one in which there could be a final determination of the controversy, so far as it concerned him, without the presence of the other defendants;

and allowed the case to proceed as to the resident defendants in the state court. This was the first material departure from the act of 1789. This act was amended by the act of March 2, 1867, so as to allow a removal on the application of either plaintiff or defendant, on making and filing in the state court an affidavit that he had reason to believe, and did believe, that from prejudice or local influence he would not be able to obtain justice in the state court.

This still further widened the jurisdiction by allowing a removal on the application of the plaintiff as well as defendant. The law of 1875 is broader and more comprehensive than all the others, and it would seem that congress, by employing the language they did, intended to avoid the construction so uniformly placed upon the previous acts, and to allow a removal wherever there should be, in the language of the constitution, a controversy between citizens of different states, although some of the plaintiffs or defendants, not being merely nominal parties, should have a common state citizenship with some or all of the opposing party, plaintiff or defendant. Indeed, it seems difficult to give meaning and effect to the act of 1875, without enlarging the jurisdiction of the circuit court, from what it stood under the construction given to previous laws, to conform more nearly to the constitution itself, whose language congress for the first time adopts.

In *Lockhart v. Horn*, 1 Woods, C. C. R. 628, Mr. Justice Bradley, in a case arising under the previous law, says:

"Were this an original question I should say that the fact of a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not oust the court of jurisdiction. It certainly would not under the constitution. The case would still be a controversy between citizens of different states. But the strict construction put by the courts upon the judiciary act is decisive against the jurisdiction, and I am bound by it."

But is such construction applicable to the act of 1875? Certainly not, if Mr. Justice Bradley is correct in saying that

a common state citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper state, would not, under the constitution, oust the court of jurisdiction.

Here is an actual, substantial controversy existing between the plaintiffs, residents of Wisconsin, and the Keokuk Northern Line Packet Company, a citizen of Missouri, upon the determination of which depends title to a large amount of property, consisting of steamboats, barges, etc., turned over by the judgment debtor to the said defendant. Perhaps it might be said to be the main controversy in the case; but I do not choose to rest the decision on that ground. If Peyton S. Davidson were a merely nominal party, the suit could be removed under the law as it has existed from the foundation of the government. But he is not. He is a proper party, with an actual interest in the controversy, so far as it relates to the alleged fraudulent transfer of the real estate to him in April, 1873. But, though a proper party, he is, in my judgment, not a necessary party, so far as relates to the alleged fraudulent transfer of the steamboats and other personal property to the Keokuk Northern Line Packet Company.

That transfer was made at a different time, to a different party, and upon a distinct and different consideration, and has no necessary connection with the transfer of the lots of land to Davidson, except that the transfer was made by the same judgment debtor. The suit as to Davidson might be discontinued and his name struck from the record, and the controversy which the plaintiffs would still have with the Keokuk Northern Line Packet Company could be fully determined, and all the rights of the parties interested be settled, without Davidson's presence.

Under the law governing creditors' bills, any person may be made a defendant who is a party to any distinct, fraudulent conveyance, or has an interest in any property so fraudulently conveyed by the debtor, if he be privy to the fraud. But he is not a necessary party to other controversies in the same suit relating to other and distinct fraudulent transfers to other persons. So any person may be joined as plaintiff



who has a judgment claim against the debtor, though entirely separate and distinct from the claims of the other plaintiffs. Such a suit is well calculated to present distinct controversies, in which some of the plaintiffs or defendants may have no real interest.

The statute says that "when, in any suit, \* \* there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them," etc. It does not say an actual controversy, which would exclude merely nominal parties, nor the principal controversy, which would devolve upon the court the duty of determining between them which should be considered the main and which the subordinate controversy; but the language is "a controversy," which means any actual controversy in which both parties have an interest. And that there may be two or more such controversies arising in the same suit is manifest, and is clearly contemplated by the act.

Now, whichever may be considered the principal controversy, here are two controversies arising in the same suit, to one of which Peyton S. Davidson is a necessary party, and in which the Keokuk Northern Line Packet Company has no particular interest, and another to which the Keokuk Northern Line Packet Company is a necessary party, but which can be fully determined as between it and the plaintiffs without the presence of Davidson. This would seem to bring the case within the meaning of the second clause of the section. And I am the more confirmed in this construction by the views of Judge Drummond in *Farmers' Loan & Trust Company v. Pekin & Southwestern Ry. Co.* 12 Chig. Legal News, No. 8, p. 65, (Nov. 8, 1879.)

But it seems just as clear that, if Peyton S. Davidson had joined in the application for removal, the case would come under the first clause of the section. Indeed, it seems a self-evident proposition that the first clause, adopting, as it does, the language of the constitution, which is the only source of power in such cases, confers all the jurisdiction which it was competent for congress to confer on the federal courts, except, perhaps, that the right of removal, under that clause, attaches

to the party, plaintiff or defendant; so that, where some are residents and some non-residents, all might have to join in the application, which is not the case under the second clause.

It might be claimed that the second clause amounts to a legislative construction of the first; that it does not include a case where some of the defendants or plaintiffs are non-residents, but one or more reside in the state with the opposite party. But it is not to be presumed that congress used the language of the constitution in a different sense from that in which the framers of that instrument used it, or that congress in the second clause intended to provide for cases not covered by the constitutional provision.

The effect of the second clause is to allow a removal in the class of cases therein described, on the application of one or more plaintiffs or defendants, without the concurrence of the others. There is, perhaps, another effect to be given to the second clause. It manifestly provides for the same class of cases as is provided for in the law of 1866. But instead of allowing a severance of the cause, it takes the whole case to this court; and the decisions thus far are to the effect that in this respect it supersedes the law of 1866.

Taking the section together, it would appear that it was the intention of congress, in all cases where there is a controversy between citizens of different states which is joint and indivisible in its nature, to allow a removal on the application of the party plaintiff or defendant. And when there are several controversies in the same suit that are properly severable in their character, to allow a removal on the application of any one or more plaintiffs or defendants actually interested in any one of such controversies, and who may reside in a state other than the one in which the other party to such controversy resides.

Take a case of a suit brought in this state by a resident thereof against two makers of a joint promissory note, one of whom resides in Wisconsin and the other in Missouri. The action is joint. The interest of the defendants is not severable. If the view I have taken of the law be correct the case may be removed at the instance of the party defendant, both

defendants joining in the application. Possibly it might be removed upon the application of the non-resident defendant alone. It is not necessary to decide that question. But suppose one defendant to be the maker, residing in Missouri, and the other the indorser, residing in Wisconsin, both of whom, under the law of this state, may be sued in the same action. Here the obligation and interest of the parties are several, and the controversy between the plaintiff and maker might be entirely distinct from the one between the plaintiff and indorser, and fully capable of determination as between them without the presence of the other defendant. And the case falls properly under the second clause, and would be removable on the application of the defendant who is a resident of Missouri, without joining his co-defendant. Under the law of 1866 the case would proceed in the state court against the indorser; but under the act of 1875, which does not countenance the severance of causes, the entire case would come to this court.

The removal clause in the judiciary act of 1789 allowed a removal on the application of the defendant where he resided in the state other than the one in which the plaintiff resided, and in which the suit was brought. And the supreme court held the "defendant" here meant the party defendant; and that, where there was more than one, they must all be residents of another state. Similar constructions have been placed upon the laws of 1866 and 1867. But the constitution extends the jurisdiction of the circuit courts to controversies between citizens of different states; and the first clause of the second section of the act of 1875 provides for a removal in all cases by either party, whenever there is a controversy between citizens of different states.

Here is a controversy between citizens of different states. Here is a controversy, and a vital one, between two citizens of Wisconsin and a citizen of Missouri. And the reasons for conferring jurisdiction upon the federal courts, apply just as strongly to such a case as to one where all the defendants are citizens of another state. The fact that, in order to take jurisdiction in such cases, the court must also take along with

it jurisdiction of a controversy between citizens of the same state, is no objection to the exercise of the jurisdiction.

If, in order to take the jurisdiction intended to be granted by the constitution, it becomes necessary to take jurisdiction of some controversies in the same suit between citizens of the same state, why, the court is quite as competent to deal with these as any other; and there are several other highly important classes of cases where jurisdiction of controversies between citizens of the same state is expressly conferred by the constitution on the federal courts.

The question is simply one of what a fair construction of the constitution is, keeping in mind the purpose had in view by the framers. The language is not at all ambiguous, and seems fairly to include all controversies between citizens of different states, not excepting those where some of the parties to the controversy, plaintiff or defendant, have a common state citizenship with some or all of the opposite party.

This seems to be the view taken by Mr. Justice Strong, in the case of *Taylor v. Rockfeller*, 7 Cent. Law Jour. 349; and, also, of Judge Dillon, in his work on the Removal of Causes, where, on page 30, he says:

"But all the legislation previous to the act of 1875 was such that the supreme court was not necessarily obliged to decide this question; and it is, in our judgment, properly to be considered as still open. It will be extremely embarrassing and unfortunate if the supreme court shall feel constrained to assign such narrow limits to the constitution. Looking at the purpose in the grant of the federal judicial power in the constitution, and the benefits which are felt to flow from the exercise of this jurisdiction, and the embarrassments which would result from a close and rigid construction of the constitution in this regard, we think the supreme court would be justified in holding that a case does not cease to be one between citizens of different states, because one or some of the defendants are citizens of the same state with the plaintiffs, or some of the plaintiffs, provided the other defendants are citizens of another or other states."

Mr. Justice Strong, in *Taylor v. Rockfeller*, says:

"Whether, since the act of 1875, the right of removal extends to all cases in which some of the necessary or indispensable defendants are citizens of the same state with the plaintiffs, or some of them, is no doubt a very important question, not yet decided. It does not, if the rule of construction applied to the judiciary act of 1789, and the acts of 1866 and 1867, is applicable to the latter act. But the latter act, for the first time, adopts the language of the constitution, and seems to have been intended to confer on the circuit courts all the jurisdiction which, under the constitution, it was in the power of congress to bestow.

"Certainly the case mentioned would be a controversy between citizens of different states, and the reasons which induced the framers of the constitution to give jurisdiction to the federal courts of controversies between citizens of different states apply as strongly to it as they do to a case in which all the defendants are citizens of a state other than that in which the plaintiffs are citizens; and if that instrument is to be construed so as to carry out its intent, it would seem the question should be answered in the affirmative."

It is a subject of regret that these questions, of so much daily interest to the profession, should not, before this, have been put at rest by the only authority finally competent to deal with them. But, until the supreme court shall have placed a construction upon the statute, the opinion of two judges of such eminence and ability is entitled to very great weight.

The case will be docketed in this court.

NOTE.—See *Ruckman v. Palisade Land Co.* ante, 367; *Burke v. Flood*, ante, 541; *Ruckman v. Ruckman*, ante, 587.

## UNION PACIFIC RAILROAD COMPANY v. McCOMB.

(Circuit Court, S. D. New York. February 21, 1880.)

**JURISDICTION—CORPORATION CREATED BY ACT OF CONGRESS—ACT OF MARCH 3, 1875.**—A suit by a corporation, created by an act of congress, is a suit arising under the laws of the United States.

Motion to remand.

*Emott, Hammond & Kidder*, for plaintiff.

*Francis N. Bangs*, for defendant.

BLATCHFORD, J. This is a suit commenced in the supreme court of New York, and removed into this court by the defendant.

The plaintiff now moves to remand it to the state court. The complaint in the suit, put in the state court, alleges that the plaintiff is a corporation created by an act of congress. The suit is brought for an accounting for certain moneys and securities alleged to belong to the plaintiff, and to have been fraudulently received and converted by the defendant, and for the cancellation of a note alleged to have been wrongfully issued and to have been fraudulently obtained from certain officers of the plaintiff by the defendant and others. The petition for removal states that the plaintiff is a corporation created by an act of congress, and that the suit and the matters in dispute therein arise under the laws of the United States. The ground on which the motion to remand is based is that the matters in dispute in the suit "in nowise concern, or are involved in, or are controlled by, any of the laws of the United States, except in so far as the same may be concerned by the fact" that the plaintiff was incorporated by an act of congress.

The second section of the act of March 3, 1875, (18 U. S. St. at Large, 470,) provides for the removal of a suit "arising under the constitution or laws of the United States" by either party to such suit. This enactment is warranted by the provision of section 2, of article 3, of the Constitution of the United States, that the judicial power of the United States "shall extend to all cases, in law and equity, arising under this con-

stitution, the laws of the United States," etc. Under the principles laid down in the decision in *Osborn v. Bank of the United States*, 9 Wheat. 738, 819, it must be regarded as settled that a suit by a corporation created by the United States is a suit arising under the laws of the United States.

The allegations of the petition above recited are sufficient to show that the suit arises under a law of the United States. The case is not like that of *Gold-Washing Co. v. Keyes*, 6 Otto, 199. In that case the corporation was not one created by an act of congress, and the petition for removal, which was made by the corporation and others, did not state facts sufficient to show that the case, which was a suit against the corporation and others, arose under the laws of the United States. In the present suit, the mere allegation that the plaintiff is a corporation created by act of congress shows that the suit is one arising under the laws of the United States.

The motion to remand the suit is denied.

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### *In re* HAMILTON, Bankrupt.

(District Court, D. Kentucky. April 14, 1880.)

**PARTNERSHIP—CONJOINT FIRM—INDIVIDUAL PARTNERS.**—There would seem to be no legal difficulty in the way of treating two firms as individual partners in a conjoint firm, if such be the obvious intention of the parties.

**SAME—BANKRUPTCY OF MEMBER OF FIRM—CLAIM PROVED BY FIRM IN COMPETITION WITH CREDITORS OF CONJOINT FIRM—COMPROMISE.**—One of such firms cannot, in competition with the creditors of the conjoint firm, prove a claim for the part payment of the partnership debts, against a bankrupt member of the other firm, where such creditors had released such partnership from all further obligation, upon the express consideration that the individual liability of the bankrupt for the residue of such partnership debt should not be impaired.

**SAME—SAME—UNLAWFUL PREFERENCE—REV. ST. § 5128.**—Such contract, made within four months of the filing of the petition in bankruptcy, did not constitute a preference in favor of the partnership creditors under section 5128 of the Revised Statutes.

**BANKRUPTCY—DIVIDEND DECLARED UNDER A TRUST—PROOF OF WHOLE CLAIM.**—A creditor cannot prove the full amount of his claim against

the estate of a bankrupt, where a dividend has been declared in favor of such creditor, under a trust for the benefit of creditors, prior to the filing of the petition in bankruptcy.

**SAME—PROOF OF CLAIM—DECLARATION OF DIVIDEND UNDER TRUST AFTER PROOF OF DEBT.**—Nothing less, however, than the payment of a sum of money, or the present right to receive such money before the proof of debt is made, will prevent a creditor from proving for the whole amount of his claim.

**SAME—SAME—FRAUDULENT CONVERSION OF FIRM PROPERTY BY BANKRUPT PARTNERS.**—If a partner has fraudulently converted property or money of the firm to his own use there would seem to be no reason why proof on behalf of the joint estate should not be allowed in respect of such property against his separate estate and in competition with his separate creditors.

**SAME—SAME—WHEN ABSTRACTION OF FUNDS NOT FRAUDULENT.**—In order to constitute fraud, however, in such a case, there must be something more than a mere abstraction of the funds without the knowledge of the copartner, particularly if it be done by one having the sole management of the business.

### In Bankruptcy.

**BROWN, J.** This case arises upon petitions of the assignee to expunge certain proofs of debt made by Swearingen & Biggs, the Bank of Kentucky, and William Hughes, trustee. The material facts of the case are as follows: On the fifteenth of September, 1875, Swearingen & Biggs, a firm of distillers, composed of George W. Swearingen and Andrew Biggs, entered into a temporary partnership with Anderson, Hamilton & Co., a firm engaged in a general provision business, composed of William B. Hamilton, the bankrupt, W. T. Hamilton and D. M. Anderson, to pack pork together on general account for the season of 1875-6. The profits and losses of this business were to be divided in the proportion of three-fourths to Anderson, Hamilton & Co., and one-fourth to Swearingen & Biggs. No firm name was agreed upon, but for convenience it will be designated in this opinion as the conjoint firm.

The money to carry on its operations was to be raised by paper bearing the name of Swearingen & Biggs as drawers, and Anderson, Hamilton & Co. as acceptors. William B. Hamilton also became an indorser of such paper in his individual character.



The hogs were bought in the name of Anderson, Hamilton & Co., and the product was also sold in their name. A new set of books was opened, and the transactions relating to said business were entered under the name of Anderson, Hamilton & Co. After making this contract, and while the pork packing season was going on, Swearingen & Biggs continued their business as before, at the same store, and Anderson, Hamilton & Co. continued their office at the same place as before, kept up their separate books in the name of Anderson, Hamilton & Co., and borrowed money and did business in that name as before. Neither of these firms had any interest in the business of the other, except the joint interest in the hog product of that season. In the course of their business a large amount of paper was drawn by Swearingen & Biggs upon Anderson, Hamilton & Co., and accepted by them, generally, in favor of Hamilton Bros., who indorsed the paper, which was also indorsed and negotiated by William B. Hamilton. Amongst the paper so negotiated were the bills proven in this case by the bank of Kentucky, amounting to \$80,000.

In June, 1876, the conjoint firm was dissolved by reason of great financial embarrassment, and the control of the hog product and the other assets of the joint account was transferred to Swearingen & Biggs. On the twenty-sixth of June an agreement or settlement was made between the conjoint firm and its creditors holding paper drawn, accepted and indorsed as above stated, by which it was agreed that upon the turning over by Swearingen & Biggs to a trustee (William Hughes being afterwards named by the creditors as such trustee) of all the hog product and other assets of Anderson, Hamilton & Co., and paying the creditor \$66,000 in 6, 12 and 18 months, with interest, securing the same upon real estate, and by warehouse receipts upon whisky of Swearingen & Biggs, the creditors would obligate themselves not to sue Swearingen & Biggs, and to accept such hog products and the sum of \$66,000 in full satisfaction of the liabilities of said Anderson, Hamilton & Co. and Swearingen & Biggs,

and of their accommodation indorsers or acceptors, Hamilton Bros.

Before this agreement was executed William B. Hamilton, the bankrupt, in order to facilitate it, agreed in writing that the proposed settlement with the conjoint firm might be made, without in any manner releasing or affecting his individual liability as indorser on any of the paper held by the creditors, assenting to remain bound as if the settlement had not been made.

Swearingen & Biggs thereupon transferred to Hughes, as trustee for the creditors, all the assets of the conjoint firm, and paid them the \$66,000.

Subsequent to the making of this agreement William B. Hamilton filed his petition in bankruptcy, and was duly adjudicated a bankrupt.

1. *As to the claim of Swearingen & Biggs.* This firm has proven against the individual estate of William B. Hamilton for three-fourths of \$100,000 and interest, this being the amount which they were compelled to pay out of their private means in order to pay off the debts of the conjoint firm. By the terms of the conjoint partnership agreement, as before stated, the profits and losses between the two firms of Anderson, Hamilton & Co., and Swearingen & Biggs, were to be divided in the proportion of three-fourths to the former and one-fourth to the latter. Swearingen & Biggs contend that, by the rules of law governing partnerships, as by the rules governing joint debtors, each partner is bound to contribute to the other his proportion of the loss which may be paid by that other partner in excess of that partner's own proportion; and that, in event of any partner being insolvent, the others and solvent ones must be assessed the portion of the insolvent ones also.

Anderson, Hamilton & Co. being insolvent and worthless, Swearingen & Biggs now claim the right to prove against William B. Hamilton, the only partner in said firm having assets, upon the ground that they have paid all the debts of the partnership, and that William B. Hamilton is responsible individually to them for three-fourths of the losses incurred in their conjoint business.

This claim is resisted by the creditors of the conjoint firm, who, under the arrangement of June 26th, were still entitled to prove against the estate of William B. Hamilton, as indorser, any balance that may remain due them after realizing from the assets turned over to the trustee.

The theory of Swearingen & Biggs, in this connection, is that the conjoint firm was composed, not of the two firms as partners, but of the five individuals composing these two firms, it being apparent that, if their claim is a partnership claim against Anderson, Hamilton & Co., the individual creditors of William B. Hamilton must be paid in full before the partnership creditors are entitled to any dividend from his estate. While it is ordinarily true that a partner cannot act as such except within the scope of the partnership business, and that one member of a firm cannot take in another partner without the assent of the co-partners, still I see no legal difficulty in the way of treating two firms as individual partners in a conjoint firm, if such be obviously the intention of the parties. Such seems to have been the case in *Cheap v. Cranmont*, 4 Barn. & Ald. 663, and there are a number of cases cited in Lindley on Partnership, 995, 998, where the members of firms were treated as partners, and allowed to prove against each other, when it could be done without prejudice to the creditors of both. It seems to be in each case a question of intent; and, in the case under consideration, I think the court ought to treat the conjoint firm, for the purposes of this case, as composed of two partners, viz.: Anderson, Hamilton & Co. and Swearingen & Biggs, for the following reasons:

*First.* No firm name was ever adopted. Each firm continued to carry on its own business and to make the paper of the conjoint firm in the name of the separate partners.

*Second.* The original agreement under which they became partners was signed by the two firms, and not by the individuals composing each firm.

*Third.* The profits and losses were divided in proportions allotted to the two firms, viz.: three-fourths to Anderson,

Hamilton & Co., and one-fourth to Swearingen & Biggs, and not to the individual members of either.

*Fourth.* The parties in this case have evidently treated the conjoint firm as composed of two partners, by proving their debt in the name of Swearingen & Biggs.

Neither of the members composing this firm claims that he has paid anything individually, but their claim is for a joint debt against Hamilton. But, conceding that Hamilton, individually, was to be considered the partner, and not the firm of Anderson, Hamilton & Co., I am unable to see how the case is taken out of the general rule, that a firm cannot prove against a partner in competition with the individual creditors of such partner; neither can a partner prove against a partner, unless they be engaged in separate and distinct trades. *Ex parte St. Barbe*, 11 Ves. 413; Pars. on Partnership, 493; Lindley on Partnership, 1007; Story on Partnership, § 391.

But there is another reason why this proof of debt should be expunged. While the creditors of the conjoint firm have acknowledged themselves satisfied, and have released and discharged their liabilities against both members of that firm, they have not been fully paid off, but have retained their right to prove against Hamilton, individually.

Certainly, in making this arrangement they could never have contemplated or intended that Swearingen & Biggs should come into competition with them. In releasing them upon payment of \$66,000, when in fact they were liable to these creditors for the full amount of their claims, they undoubtedly took into consideration the amount that would probably be realized from the individual estate of the bankrupt.

Although the letter of the agreement is silent upon this point, it would be clearly at war with its scope and purpose now to permit Swearingen & Biggs to come into competition with these creditors, who are evidently doing them a favor by releasing them upon the payment of a less amount than that for which they were legally liable. The proof of this claim amounts, in effect, to an endeavor to retake a portion of the price paid by them for their release and immunity from further

liability. The exceptions to this claim must be sustained and the proof expunged.

2. *As to the claim of the Bank of Kentucky.* This bank is a holder of paper drawn by Swearingen & Biggs upon Anderson, Hamilton & Co., and indorsed by William B. Hamilton, to the amount of over \$80,000, and has proved for the whole of its claim.

The trustee, prior to the filing of his petition by Hamilton, realized from the assets turned over to him by Swearingen & Biggs a sum sufficient to pay the creditors 50 per cent. on their debts, declared a dividend of that amount, and notified the creditors to call for it. The Bank of Kentucky declined to receive its dividend until after Hamilton filed his petition, but it has stood to the credit of the bank ever since the dividend was declared. I am clearly of the opinion, and so held upon the argument, that this 50 per cent. should have been credited by the bank before proving its claim.

The fact that it was not actually received is of no consequence. The dividend had been declared in their favor. They had been notified of it, and, as against other parties to the notes, must be deemed to have received it. They cannot thus take advantage of their own wrong to prove up the whole of their debt to the prejudice of other creditors. *Sohier v. Loring*, 6 Cush. 537; *In re Hicks*, 19 N. B. R. 299.

But it is insisted in this case that Hamilton had no right to waive his release of liability in favor of the creditors of the conjoint firm. Aside from the special provisions of the bankrupt act, there would be no difficulty in sustaining the validity of this waiver. It was a part of the contract under which the creditors agreed to release their claim against the conjoint firm, and was therefore not without consideration. Such reservations of a claim against indorsers have been repeatedly held valid. *Potter v. Greene*, 6 All. 442; *Toby v. Ellis*, 114 Mass. 120.

But it is insisted that this liability was released at a time when Hamilton was insolvent, and within four months prior to his filing of his petition in bankruptcy, and it must be held to have been a preference, and therefore invalid. I am una-

ble to concur in this conclusion. To constitute a preference, under section 5128, the party must make a payment, pledge, assignment, transfer or conveyance of a part of his property, either directly or indirectly, absolutely or conditionally, to some person not only having reasonable cause to believe him insolvent, but knowing that such pledge, assignment, payment or conveyance is made in fraud of the provisions of the bankrupt act.

There was no payment of money or conveyance of any property in this case, nor was there any evidence or reason to believe that the creditors of the conjoint firm contemplated any violation of the bankrupt act, or had any reason to believe they were obtaining an unlawful preference. But, aside from this, I do not understand that the bankrupt law will treat an arrangement for a compromise made by a party who subsequently becomes bankrupt as a fraud upon the act, provided it be made by all parties in good faith, and an honest belief on the part of the insolvent that he will be able to carry it out. *Mays v. Fritton*, 20 Wall. 414; *Clark v. Skilton*, 20 Int. Rev. Rec. 175.

But one more question in this connection remains to be considered. Subsequent to the proving of its debt against Hamilton, and about a year after the first dividend of 50 per cent. was paid, the bank received another dividend of 25 per cent., which the assignee now claims should be credited upon its debt, upon the theory that the transfer to Hughes, the trustee, was, at the time it was made, a payment to the creditors of a sum equal to the value of the property received; and, as this property finally realized 85 per cent. of their debts, or 75 per cent. after the costs and expenses were paid, that these creditors, of whom the Bank of Kentucky is a representative, can only prove for the remaining 25 per cent.

This theory cannot be supported. The authorities above cited hold, and such I understand to be the law, that nothing less than the payment of a sum of money, or the present right to receive such money before the proof of debt is made, will prevent a creditor from proving for the whole amount.

In *Sohier v. Loring*, 6 Cush. 537, the creditor made a com-

position with the maker of the notes, whereby the maker conveyed certain property in trust to pay one-fifth of the debts, which the creditor accepted, reserving his remedy against the indorser. Here there was an agreement accepted by them to receive a specific sum, not an uncertain amount, to be made certain by the sale of property, and the court held it to be substantially a payment of that amount. It was also held in that case that the other creditors, who had made proof of their claims against the indorsers before they entered into the composition with the acceptors, were entitled to prove the full amount due upon their bills.

*In re Hicks*, 19 N. B. R. 299, the makers of the notes effected a composition with their creditors, the composition to be paid in three, six and nine months, for which notes were given. The creditor was offered the notes to which he was entitled, but refused to receive them until the twenty-fifth of September, 1878, when, one of them having matured, he accepted cash for that note and the other two notes. Meanwhile, on the ninth of September, the indorsers having been adjudicated bankrupts, the creditors proved against their estates for the full amount of the original notes. The learned judge for the southern district of New York held that as, at the time the proof was made against the indorser, no dividend had been paid or become payable to the creditor out of the estate of the maker, he was entitled to prove against the indorser for the whole debt. The case seems to be distinguishable from that of *Sohier v. Loring* only in the fact that he refused to receive the composition notes until after he had filed his proof of debt.

But both of these cases are clearly distinguishable from the one under consideration, in the fact that the compromise with the conjoint firm was for no specific amount of money, but for certain property, the value of which was not determined until long after the proofs of debt were made. The property received by the trustee might not have paid more than 50 per cent. had the market taken a decided upward turn. It might have realized the entire amount of their claims, but it was difficult, at the time the agreement was

made, to fix the value of the composition, and utterly impossible to know how much it might ultimately realize. So far as it was fixed by the payment of 50 per cent. I have no doubt the credit should be given, but I apprehend it would be exceedingly difficult even now to say what the property was worth at the time it was turned over, and, upon the theory of the assignee, the amount of credit must be gauged by this value.

We are not at liberty to say that it was 75 per cent., from the fact that 75 per cent. was subsequently realized. If a composition payable *in futuro* can ever be allowed as a credit, it must be a composition for a fixed and definite sum.

I think the Bank of Kentucky is entitled to prove one-half of its original claim.

3. *As to the claim of William Hughes, trustee.* The facts connected with this claim are substantially as follows: While Anderson, Hamilton & Co. had charge of the hog product for sale, they shipped lard of the value of about \$68,000 to New York, which was done without the knowledge or consent of Swearingen & Biggs. The proceeds of the lard were first charged to Anderson, Hamilton & Co., on the books of the conjoint firm, and were then charged to William B. Hamilton, by his direction, and he received the proceeds of the sale, amounting to the principal of the debt proven.

The account between Anderson, Hamilton & Co. and Swearingen & Biggs has not been settled, but in no event can the creditors of the conjoint firm be paid in full, nor will the estate of Hamilton pay on account of claims due by the conjoint firm a sufficient sum to discharge the liability for the lard thus applied to his own use. Hughes, as the trustee of the conjoint firm, now seeks to prove against the individual estate of William B. Hamilton a claim for the property so appropriated.

Section 5121, relating to the bankruptcy of partnerships, provides that "the assignee shall keep separate accounts of the joint stock or property of the copartnership, and of the separate estate of each member thereof; and, after deducting out of the whole amount received by the assignee the whole of



the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors."

The section contains a further provision that in case there is a surplus, after payment of the debts peculiar to each partner or the individual member, it shall be paid to the creditors of the other. This section is a substantial embodiment in statutory form of an equitable principle, which has long obtained both in England and this country, to the effect that partnership assets must go, primarily, to pay partnership creditors, and individual assets to individual creditors. In England, however, where the general rule originated, it is subject to certain well established exceptions, one of which is that, if the partner has fraudulently converted property or money of the firm to his own use, proof on behalf of the joint estate is allowed in respect of such property against his separate estate, and in competition with his separate creditors. *Lindley on Partnership*, 996, 1004, 1007; *Lodge v. Fendall*, 1 Ves. Jr. 166; *Ex parte Harris*, 2 Ves. & B. 210; *Ex parte Young*, 3 Ves. & B. 34; *Ex parte Smith*, 6 Mad. 2.

It is insisted, however, in opposition to the proof of debt in this case, that the exceptions mentioned to the English rule ought not to be incorporated into our bankruptcy system, and cannot stand, in the face of the express provision of section 5121, above quoted. There are some cases which undoubtedly lend support to this theory. In the *Somerset Potters' Works v. Minot*, 10 Cush. 592, it was held by the supreme court of Massachusetts that under the insolvent law of that state, which contained a provision similar to that of the bankrupt act, the net proceeds of the separate estate of each partner must be first appropriated to pay his separate creditors, and that this rule was not subject to any exceptions which would be admitted in England. It was said in that case that "if there be no joint property the creditors of the firm cannot, under the statute, share in the separate property *pari passu* with the separate creditors," although it was admitted that in

England a case of this kind constituted an exception to the general rule.

Although in this case there appeared to have been sufficient joint assets of the firm to take the case out of the exception and make the general rule apply, the court, in delivering the opinion, observed: "This whole matter of exceptions to the general rule of distribution of joint and separate assets, as we have already intimated in considering another point, is of very questionable expediency, and we are not disposed to favor its introduction into our system. We are strongly inclined to the opinion that our rule of distribution of the assets of insolvent debtors, being a statutory provision, is to be carried into effect according to its terms. The legislature has created the rule, but has not appended to it the exceptions." See, also, *Howe v. Lawrence*, 9 Cush. 559.

In at least one case arising under the bankrupt law these authorities have been accepted as a correct exposition of the principles which should guide us in the distribution of partnership and individual assets. *In re Byrne*, 1 N. B. R. 464.

In the case of *Lane*, 10 B. R. 135, the money was drawn out of the firm by one partner with the assent of his copartners. As there was no fraudulent withdrawal of the funds, the case cannot be considered as conflicting with the English authorities.

So, also, *In re McLean*, 15 N. B. R. 333, while the Massachusetts cases are approved, and the intimation thrown out that, under the bankrupt law, there can be no exceptions to the method of distribution provided by section 5121, the fact was that the case was not brought within any one of the exceptions. A firm had advanced capital to an individual member beyond his share, and it was held, I have no doubt, properly, that the assignee of the firm could not come upon the separate estate of the debtor copartner for the use of the creditor copartnership until all the joint creditors were fully satisfied.

In a number of cases, however, exceptions to the general rule have been recognized, and the Massachusetts cases held as not applicable to the bankrupt law.

*In re Jewett*, 1 N. B. R. 419, Judge Drummond held that where there are both individual and partnership creditors, but the assets were individual only, consisting of goods purchased by the bankrupt from the partnership on its dissolution, prior to the bankruptcy, the creditors would be entitled to be paid *pari passu* with the individual creditors.

In the subsequent case of *Knight*, 2 Biss. 518, Judge Drummond gave the matter a very careful and extended consideration, and held that the federal courts, in construing the bankrupt law, were not bound by the Massachusetts cases, and an exception to the rule was adopted, that "where there are both partnership and individual debts, but no partnership assets and no solvent partner, the debts of the firm and of the members can be proved, and the estate be distributed *pari passu* among the creditors. To the same effect are *In re Downing*, 3 N. B. R. 748; *In re Rice*, 9 N. B. R. 373; *In re Long*, Id. 227; *In re McEwen*, 12 B. R. 11.

I find no case in which the question has arisen upon the fraudulent appropriation by one of the partners of a portion of the assets; but, as the English cases recognize this as a well established exception to the general rule, I see no reason why we should not regard it as equally applicable here.

But I have come to the conclusion, with considerable hesitation, that the facts do not make out a case of fraudulent abstraction of the partnership funds. Obviously, it is not every case where a partner overdraws his account, even without the consent of his other partners, that fraud can be imputed. Anderson, Hamilton & Co. had the entire control and management of the partnership business, and although Swearingen & Biggs were actually and legally partners in the concern, they do not appear to have taken part in the actual conduct of its business, and apparently lent their names to Anderson, Hamilton & Co. for their accommodation, with the understanding that they were to have one-quarter of the profits for so doing.

The withdrawal of the \$68,000 was made in February, was entered upon the books of the conjoint firm, and was afterwards charged to Hamilton's individual account. No bank-

ruptcy at this time was contemplated, and there is no evidence of an intent by Hamilton to increase his individual estate for the benefit of his creditors. The authorities seem to hold that to constitute a case of fraud the funds must have been abstracted, not only without the consent of the other partners, but that it must have been done secretly, as by a false entry upon the books, or by the omission to make any entry at all. Thus, in *Ex parte Smith*, 1 Glyn & I. 74, it was held that if one partner be entrusted with the entire management of the partnership concern, and he withdraws moneys for his separate use, which he duly and openly enters in the partnership books, this is not a fraud which will entitle the joint estate to prove against the separate; otherwise, if by the entries in the books he disguises the transaction or wholly omits and conceals it.

In *Ex parte Lodge v. Fendall*, 1 Ves. Jr. 166, Lodge, who had the whole management of the trade, without the knowledge of Fendall paid several debts of his own with the property of the partnership to the amount of \$36,000.

Lord Thurlow at first was inclined to hold that this constituted a case of fraud, but finally dismissed the petition, regarding the evidence as insufficient. In *Ex parte Harris*, 2 Ves. & B. 210, it was considered that, although the misapplication of the funds was without the knowledge, privity, consent or subsequent approbation of the other partner, yet the facts by reason and in consequence of which that application was made were with that knowledge, consent, etc., and that proof should not be admitted. In *Ex parte Young*, 3 Ves. & B. 31, one partner drew bills clandestinely to a large amount and absconded, and it was held that proof should be allowed in favor of the joint estate, no entries having been made of the bills abstracted; and the lord chancellor observed that if the other partners could have known that their copartner had applied the copartners' property to his own purposes, from their immediate or subsequent knowledge, upon their subsequent dealings, their consent would be implied.

In *Ex parte Hinds*, 3 De Gex & Small, 613, two partners

were trading as merchants at Liverpool and Barbadoes, one residing and transacting the business at each place. The Liverpool partner, without the authority or knowledge of the other, laid out partnership moneys in the purchase of railway shares in his own name, but on account of the partnership, and in substance declared himself a trustee of the shares for the firm; afterwards the firm became bankrupt. It was held that the joint estate had no right of proof against the separate estate of the Liverpool partner for the amount laid out upon the shares. All the prior authorities are reviewed by the commissioner in this case, which, in its facts, is very much like the one under consideration, and he came to the conclusion, in which he was sustained by the vice chancellor, that as the entries were made openly upon the books, and as these books were open to the inspection of the other partner, who, if he had exercised only ordinary diligence, would have acquired full information on the subject, his negligence amounted to an implied consent. Story on Part. § 390, 392; Pars. on Part. 491, 494.

These cases indicate that to constitute fraud there must be something more than mere abstraction of the funds without the knowledge of the copartner, particularly if it be done by one having the sole management of the business. Upon the whole, I think the conclusion of the register in postponing this claim to those of the individual creditors of Hamilton ought to be confirmed. But I will not undertake to say that the assignee might not maintain a petition to have the money thus charged over to Hamilton administered as a part of the joint estate, as was done in *Ex parte Hinds*, above cited.

IN THE MATTER OF FRANKLIN M. KETCHUM and others,  
Bankrupts.

(*District Court, S. D. New York.* January 10, 1880.)

**PARTNERSHIP—CONVERSION OF CHATTELS BY ACT OF PARTNER.**—If a firm acting through an agent or one of the partners, while engaged in the regular course of the business of the firm, innocently or wrongfully appropriates chattels, other than money, or what has the quality of money, and sells it, and receives and uses in its business the proceeds, or, without a sale, uses it in the firm's business, the firm is liable for conversion, and it is wholly immaterial that all or any of the members of the firm were ignorant of the wrong committed, or innocent of any wrongful intent.

**SAME—CONVERSION OF MONEY BY ACT OF PARTNER.**—The firm is liable for the misappropriation of money under such circumstances where the innocent partner, on the facts proved, appears to have no equity to avail himself of the payment of the money to the firm, as a payment between himself and his copartner, of money in settlement or adjustment of any balance due to him on account of the partnership business, or as a payment of money to him upon any consideration whatever, in receiving which he relied upon his copartner's possession as proof of ownership, where by reasonable inquiry such innocent partner could have discovered the source from which the misappropriated money came.

**SAME—CONVERSION BY FIRM.**—A firm is liable for conversion, where an individual partner fraudulently drew and deposited checks and hypothecated securities for the benefit of the firm, without first receiving the proceeds of such checks and hypothecations.

*C. W. Bangs*, for Morris Ketchum.

*C. W. Betts*, for F. M. Ketchum.

*O. E. Bright*, for opposing creditors.

CHOATE, J. This is a proceeding to expunge two proofs of debt made and filed by Morris Ketchum. The bankrupts, Franklin M. Ketchum and Thomas Belknap, Jr., were partners, composing the firm of Ketchum & Belknap, and they were adjudicated bankrupts on the petition of Ketchum, one of the partners, filed August 31, 1878. They did business as stock-brokers, in the city of New York, down to the twenty-fourth of July, 1878, when they failed. The proofs of debt now objected to were sworn to by Morris Ketchum and filed July 30, 1879. One is for the sum of \$8,612.37, alleged to be due "upon an account stated between deponent and said Ketchum & Belknap, of which account a copy is hereto annexed."

Annexed to the proof is an account showing sundry items of cash debit and credit between the dates of June 2, 1875, and July 24, 1878, with a balance struck July 24, 1878, to the credit of Morris Ketchum, of \$8,549.21, to which interest is added to August 31, 1878, making in all the sum mentioned in the proof of debt, \$8,612.37. The second proof of debt is for \$27,080.69, alleged to be due as "the proceeds of certain stocks and securities which the said Ketchum & Belknap held for this deponent, and belonging to him, which were sold and disposed of by the said Ketchum & Belknap, and said proceeds appropriated to their own use."

There is little or no dispute about the facts. The firm of Ketchum & Belknap was in business from some time in the year 1871 to the time of their failure, except for a period of about eight months after the panic of 1873, when they suspended business. The partner Ketchum had a seat in the stock board, and attended almost exclusively to buying and selling stocks for customers, and other business of the firm out of the office. Belknap attended almost exclusively to the business in the office, the financial affairs of the firm, the raising of money, the drawing of checks, and the charge of the bank account. For several years prior to the failure this alleged creditor, Morris Ketchum, who was the father of Ketchum, the bankrupt, employed the bankrupt Belknap, individually, as his agent and attorney to attend to some parts of his business. He entrusted to Belknap, individually, for safe keeping, large amounts of stocks and securities, which Belknap kept in a tin box, of which he retained the key. The box was deposited in a safe in the office of the firm, to which safe both the partners had access.

Morris Ketchum also kept a deposit account with the Fourth National Bank of New York City, and Belknap individually acted as his attorney in drawing out moneys from this account, upon checks signed by him, in the name of Morris Ketchum. This part of the business done by him for Morris Ketchum was transacted under a power of attorney, executed before the formation of the firm, which authorized Thomas Belknap, Jr., and Franklin M. Ketchum, severally,

to draw and indorse checks and drafts. This power was, in fact, not acted on by Franklin M. Ketchum, but by Belknap alone. Belknap had no authority, as between himself and Morris Ketchum, to draw out any money from the bank, except for the proper use and benefit of Morris Ketchum, nor had he any authority to use or dispose of said stocks and securities except by order of Morris Ketchum. Belknap, without the knowledge or consent of Morris Ketchum, from time to time drew checks, in Morris Ketchum's name, against this bank account for various sums of money, and deposited said checks to the credit of the firm of Ketchum & Belknap in the same bank, where they also kept their bank account. These transactions were wholly without the knowledge of Franklin M. Ketchum until after the failure of the firm, when Belknap informed his partner and Morris Ketchum of the fact that he had misappropriated these funds to the use of the firm by depositing them in their bank account.

Belknap, also, without the knowledge or consent of Morris Ketchum, or of his partner, Franklin M. Ketchum, sold and disposed of some of the stocks and securities belonging to Morris Ketchum, in his possession, and deposited the proceeds of them in the bank account of the firm, and used others of these stocks and securities by hypothecating them with the Fourth National Bank for loans to the firm; and, at the time of the failure of the firm, some of the stocks thus hypothecated were still held by the bank as security for such loans. The proof of debt first above stated, being the balance of an alleged account, consists wholly of moneys thus transferred by means of checks drawn as aforesaid from the account of Morris Ketchum to the account of the firm. The proof of debt second above stated is for the value of the securities so sold, and their proceeds deposited in the firm's bank account, and of those hypothecated with the bank as security for its loans to the firm. At the time of the failure the firm was largely indebted to the bank for over drafts, besides the secured debt above stated.

After the failure and before the filing of the petition in  
v.1,no.10—52



bankruptcy, Belknap made entries in the books of the firm crediting Morris Ketchum with the amounts of the several checks misapplied by him as aforesaid, and also entered upon the books of the firm, as of the date of July 24, 1878, a credit of Morris Ketchum "for sundry stocks and bonds, \$26,822.50." It is not shown when these entries were made, except that they were in August, 1878, and before the filing of the petition in bankruptcy by Franklin M. Ketchum. In the schedule of debts annexed to his petition the bankrupt Ketchum included the following as unsecured claims of Morris Ketchum: "Sales of sundry stocks and bonds belonging to said Morris Ketchum, and which Ketchum & Belknap were unable to return credited at market value, on July 24, 1878, \$26,822.50; interest to August 31, 1878, \$198.19." "Balance of book account, receipts and payments of money on July 24, 1878, \$8,549.21; interest to August 31, 1878, \$63.16." Another unsecured claim of Morris Ketchum is included as to which no question is raised, with the exception of the entries thus made in the books of the firm.

After the failure and the insertion of these items in this schedule of the firm debts, nothing was done by either partner, so far as the evidence shows, by way of adoption by the firm of these contested claims, nor was any account rendered by the firm to Morris Ketchum, or any agreement made between him and the firm in respect to said moneys so received by the firm, or in respect to said securities, other than such as may be, if any, implied by law from the foregoing facts. Franklin M. Ketchum testified that, at the time he inserted these items in the schedule, he knew of the entries made in the books by Belknap, and he put these claims in the schedule because he believed the firm to be liable for the money and stocks to Morris Ketchum. It also appeared, by the evidence, that, at the time of making the schedule, Franklin M. Ketchum knew, by the confession of Belknap, that the money and the stocks had been wrongfully used by Belknap, and that the proceeds had gone into the bank account of the firm. Belknap drew from the firm bank account for his own use, and for the use of the firm, at all times indiscriminately, and

there is no proof that he individually used the money thus wrongfully paid in, except so far as it may be inferred from this indiscriminate drawing on the bank account, which was partly for his own private stock speculations, which were in violation of the partnership agreement; and, at the time of the failure, he was largely indebted to the firm, and his frauds caused, or largely contributed to cause, the failure of the firm.

There is no evidence whatever of an account stated as to the moneys taken from the private bank account of Morris Ketchum and deposited in the bank account of the firm. No account, such as is annexed to the first proof of debt, and which is a copy of the account made up by Belknap in the firm's book, was, so far as appears, ever rendered to Morris Ketchum or assented to by him. Without such assent to the account, either express or implied by failure to object to it upon its being rendered, there can be no account stated. Therefore, if there be any liability of the firm for these moneys the same is misdescribed in the proof, of debt. The question of liability, however, has been argued upon the facts proved, with little regard to form, and if a firm liability exists the proof may be amended or a new proof, according to the fact, may be filed. So in regard to the second proof of debt, so far as regards the securities sold by Belknap, it is clearly stated untruly in the proof of debt that they were held and sold by the firm. As to those securities the liability of the firm, if there is any, arises not from the improper sale of the securities, which was Belknap's individual act, but from the receipt of the money and its subsequent use by the firm. And in this respect, also, if the claim is sustained, the proof may be amended or a new proof filed.

The questions that arise are different as to the money taken from the private bank account, the stocks pledged to the bank for a loan to the firm, and the proceeds of the stocks deposited in the firm's bank account. Upon the argument a large number of cases have been cited, illustrative of the rules of law as to loans made to a partner, where the moneys are by him used for the purposes of the partnership. As to this

whole class of cases the rules of law are well settled, but they afford little or no aid in determining the questions that arise where the money or the property used by the firm is brought in through the fraud of one of the partners in abusing the trust confided to him by a third party.

Where a third party loans money to a partner on his individual credit, his putting that money into the firm creates no contract between the firm and the lender, for the very obvious reason that it was the lender's intention to lend the money to the individual partner, and, as in such a case the money is lent without any restriction as to its use, the borrower may do what he likes with it, and what he does with it is no longer any concern of the lender; and, of course, it makes no difference whatever that the borrower's copartner happens to know, when the borrower pays it into the firm, that he has borrowed it even for the purpose of lending it to the firm.

If a partner, in applying for a loan, however, acts therein as a partner and for his firm, then the firm will owe the money to the lender, even though he did not, at the time, know that the borrower was acting for his firm. At any rate, if he chooses to treat the firm as the borrower, he may do so as in any other case of an undisclosed principal acting through an agent. But it is unnecessary to refer especially to this class of cases, because the principles that govern the present case are not those that relate to the lending of money unattended by fraud or breach of trust.

It is claimed by the learned counsel for the contesting creditors that the rule of law is well settled that where a partner, coming into the possession of money by the abuse of his individual trust, or duty to a third person, puts that money into the firm without any knowledge of the fraud on the part of his copartners, no obligation arises on the part of the firm to pay back the money to the party who, as against the partner so wrongfully paying it in, could demand it; that, though the guilty partner is liable to the person wronged, the firm is not liable; that, though the party wronged, if he can trace the money distinguishable from other moneys in the

hands of the firm, may follow and recover it as his specific property, yet that he cannot maintain an action, as for a debt, or as for money had and received, against the firm for it, if, as in this case, the money is spent and gone.

There are some points in regard to the liability of a firm for the misappropriation of the property of a third party well settled; thus, if the firm has assumed, or is properly chargeable with, any duty in the safe-keeping of the property, the firm is liable for its misappropriation by one partner, although done without the knowledge of the other partners. This rule rests on the familiar principle that, within the scope of the partnership business, each partner is the agent of the firm, and the act of each partner, whether in making a contract, or in performing, or failing to perform, a duty imposed on the firm by contract, is the act of all. And, where one of the partners is employed in a transaction or matter of business fairly within the scope of the business undertaken to be transacted by the firm, the fact that he was specially trusted by the customer, or that the business was transacted, so far as the firm was concerned, exclusively by him, and without the knowledge of the copartners, will not, in itself, make the transaction an individual transaction.

The question is one, in every case, of fact and of the intention of the parties, the principle being that, if the business was fairly, as between the partners themselves, a firm matter, in the benefits of which, under the co-partnership agreement, they were entitled to share, or if the customer, in fact, employed the partner as a member of the firm, engaged in the business, to which the particular transaction belonged, and was justified in so doing by the nature of the business of the firm, as publicly exhibited, then the transaction is a firm transaction, and in every such case the firm must make good all unauthorized intermeddling with the customer's property, by either partner, in violation of the duty which the firm, or he, on behalf of the firm, has assumed with regard to the property.

And it seems that the employment of a member of the firm, carrying on a particular kind of business, as, for in-

stance, that of a stock-broker, or a solicitor in a matter fairly within the line of business done by the firm, though the form of the employment, so far as correspondence or personal intercourse with the customer or client is governed, is with one of the partners only, and it is induced by relations of special friendship with or confidence in him, yet it is presumed to be, as a matter of fact, an employment of him as a member of the firm, thus throwing the burden of showing that the employment was really intended to be personal on the firm, if they deny their liability. *Willett v. Chambers*, Cowp. 814; *Devaynes v. Noble*; *Clayton's Case*, 1 Mer. 575; *Baring's Case*, 1 Nev. 611; *De Rebeque v. Barclay*, 23 Beav. 107.

These, and other similar cases which might be cited, rest on the basis of a violation by the firm of a duty assumed by the firm, under an employment made with, or which, under the circumstances, the firm cannot deny was made with it. They are not, properly, cases of a firm getting into its possession the property of another party by the tortious act of one of the partners; but from the admitted principles of the law of partnership there would seem to be no question that a firm would be liable in trover for the conversion of personal property other than money, or what, by the law merchant, passes for money, under the same circumstances under which an individual would be liable in that form of action.

Each partner being the agent of the firm in the transaction of its business, the firm is liable for the tort of either of its members, if, under the same circumstances, any other principal would be so liable; that is, if the principal has authorized the particular act, or has adopted it, and taken the benefit of it, or, without special authorization, it was done by the agent in the course of and as part of his employment. The test of liability for trover or conversion of chattels is the unauthorized exercise of such dominion over them as is inconsistent with the rights of the true owner. *Bryce v. Buckway*, 31 N. Y. 490; *Heald v. Carey*, 11 C. B. 977; *Cobb v. Dows*, 10 N. Y. 335; *Helbery v. Hatten*, 2 H. & C. 822.

That the sale or hypothecating of chattels, without authority, is a conversion, is too clear to need authority; and

it is wholly immaterial whether the unauthorized sale, or pledge, or other act of conversion, was knowingly wrongful, or, in fact, wholly innocent, done under a mistake as to the title or the right of the party making the sale or pledge. (*Same cases.*) That ignorance of the fact that the property belongs to another, and the want of intent to commit a trespass upon it, constitutes no defence to an action of *trover*, is in conformity with the rule of the common law that no man can (with certain exceptions not here needful to notice) be deprived of his property without his own consent, and that his permitting another to have the possession of his chattels does not carry with it such an *indicium* of title as authorizes or justifies any other party, dealing with the party so in possession, to rely upon that possession as evidence of title. *Ballard v. Burgett*, 40 N. Y. 314.

The owner may estop himself by declarations, real or written, creating or importing an apparent title on which parties dealing with the person may rely. This, however, is only where, upon the principles of estoppel *in pais*, the prevention of possible or intended frauds makes it necessary in favor of persons parting with value, or altering their condition for the worse by reason of the reliance on the declarations that the title shall be held to pass. *Moore v. Metropolitan Bank*, 55 N. Y. 41.

Clearly, then, with this exception of a case of estoppel, all the world deals with chattels, wherever found, at the peril of liability for *trover*, if in fact they belong to another, or the party dealing with them has in fact no right to them. If one is misled by another's possession and apparent ownership of them it is his misfortune, for which the owner is not responsible, and which constitutes no legal defence to a claim for their conversion.

If, therefore, a firm, acting through an agent or one of the partners, while engaged in the regular course of the business of the firm, innocently or wrongfully appropriates chattels, other than money, or what has the quality of money, and sells it, and receives and uses in its business the proceeds, or, without a sale, uses it in the firm's business, the firm is liable

for conversion, and it is wholly immaterial that all or any of the members of the firm were ignorant of the wrong committed, or innocent of any wrongful intent. But, when the thing misappropriated is money, other considerations arise, growing out of the nature of money.

It is a maxim of the common law that money has no ear-mark. The peculiarity of money, as distinguished from other chattels, is that the title to it passes by delivery, and any one taking it without notice of any other title to it may safely rely on the title of the party in possession of it. This is essential to its beneficial use as money, and any private mischiefs that may result from the principle are outweighed by the public and general good resulting from its use. Yet the maxim that money has no ear-mark was very early held not to prevent the owner of property wrongfully converted into money from tracing and recovering it, if the money had been again invested by itself in other property, although in the meantime it had been in the form of money in the possession of the wrong-doer.

Thus, in *Whitcomb v. Jacob*, 1 Salk. 160, (9 Ann.) it was ruled that, if one employs a factor and "entrusts him with the disposal of merchandise, and the factor receives the money, and dies indebted in debts of a higher nature, and it appears, by evidence, that this money was vested in other goods, and remains unpaid, those goods shall be taken as part of the merchant's estate, and not the factor's; but if the factor have the money it shall be looked upon as the factor's estate, and must first answer the debts of his superior creditor, etc.; for, in regard that money has no ear-mark, equity cannot follow that in behalf of him that employed the factor." See, also, *Scott v. Surnam*, Willes, 400.

Modern decisions, however, have so far modified or defined, in its application, the ancient doctrine that money cannot be traced when mingled with other moneys, that it is now established that the owner of property, which has been disposed of without his authority, can recover the proceeds, if the same can be traced, as a part of a particular fund or lot of money, or as part of a deposit of money in bank, though

mingled in such fund or deposit with other money, or into whatever form or new investment the proceeds may be carried, whether of money or property, provided that the rights of third parties have not intervened. And it is the settled rule of courts of law, as well as of courts of equity, that, "where property is tortiously disposed of by one entrusted with it, the title of the owner of the property so misappropriated attaches to the proceeds, whatever may be their form, whether money or anything else; that the substitute for the original thing follows the nature of the thing itself, so long as it can be ascertained to be such." *Taylor v. Plumer*, 3 M. & S. 573; *Small v. Atwood*, 1 Younge, 537; *Pennell v. Deffell*, 4 De G., McN. & G. 386; *Frith v. Cartland*, 2 H. & M. 241; *Van Allen v. American Nat. Bank*, 1.

Except as against persons who have parted with value for the money which was the proceeds of the property, the title of the former owner of the property to the money remains unaffected, so long as he can trace it.

Money, of course, is lost to the owner, and cannot be recovered, or the receiver held liable for its value, if he took it in good faith, without notice of any other title, in payment of a debt, or for the purchase of property, or for other valuable consideration. But this is the limit of the distinction between money and other chattels. See *Clarke v. Shee*, Cowp. 200. And in this case the learned counsel for the opposing creditors concedes that if Morris Ketchum's money still remained in the bank deposit of the firm he could recover it.

It is not very obvious why, if the firm is not liable to an action for money after they had used it, they can justly or consistently be held obliged to restore it if they have not used it, because, if the mode in which they took it does not give them such an equity in it as will enable them to hold it against the true owner, their use of it in their business would seem to give them no new equity or right in it, but would seem, on the contrary, to subject them to an action for money had and received, for having disposed of another's money without authority, if it be, indeed, the case that it was still his, so that he could recover it *in specie*.



But the real question, after all, is whether the circumstances under which the money came to the hands of the firm were such that Franklin M. Ketchum, as the copartner of Belknap, acquired an equity in it, or right to keep it, as being apparently Belknap's money, contributed to the firm by him, which ought to prevent a suit for the recovery against the firm. As to Belknap, or the firm, if his interest in the firm were alone to be considered, it is clear that a suit could be maintained. The only possible equity of Franklin M. Ketchum in the money, upon its being paid into the firm by Belknap, which will take the case out of the general rule, that would allow it to be recovered by the owner, grows out of the nature of money, as stated above. This equity must be based on the fact that Belknap paid it in in the form of money, and, therefore, that his copartner had the right to rely on Belknap's possession of it, as evidence of its being in fact his money; for this is the only distinction that can be drawn between money and other personal property in such a case. In other words, did Franklin M. Ketchum, so far as it was received on his behalf, receive it in payment of a debt or for some other valuable consideration?

The counsel for the opposing creditor relies chiefly on two cases, which, it is claimed, establish the general position that if one partner misapplies trust funds in his hands by paying them into the firm, without knowledge of the fraud on the part of his copartner, the firm is not thereby rendered liable to an action to recover the money. These cases are *Ex parte Apsey*, 3 Bro. C. C. 265, and *Jacques v. Marquand*, 6 Cow. 497.

The case of *Ex parte Apsey* was before Lord Chancellor Thurlow, and decided in 1791. The report is very brief, and shows the following facts: On the eleventh of February, 1790, a commission of bankruptcy issued against one Toey. The petitioner Apsey and Edward Allen were chosen his assignees. Edward Allen and James Allen were partners in business, and in April, 1791, a joint commission in bankruptcy was issued against them. Edward Allen, before the issue of the commission against himself and his partner, received

money as assignee of Toey, which he had paid and applied in discharge of the debts of his firm, and otherwise used in their firm business. The question was whether Apsey, as assignee of Toey, could prove for the money so used by the firm of Edward and James Allen against their joint estate. Proof was refused, and upon petition to the lord chancellor the decision was sustained.

Counsel for the petitioner cited the cases of *Boardman v. Mosman*, 1 Bro. C. C. 68, and *Ex parte Clones*, 2 Bro. C. C. 595. But the lord chancellor said: "In the latter of these cases the partners had agreed to consolidate the separate debts which made the difference. Here, one, by abusing his trust, advances the money to the partnership. That will not raise a contract between the partnership and the person whose money it is."

That the firm will be liable to an action to recover the money, where the other partner knew of the source from which the money paid in was derived, and that it belonged to or was charged with a trust in favor of another party, on the ground that one who aids in the perpetration of a fraud will be equally responsible with the principal wrong-doer, is sufficiently obvious; but it has been frequently so ruled. *Vanderwich v. Summerel*, 2 Wash. C. C. 41; *Hutchinson v. Smith*, 7 Paige, 33; *Walsin, ex parte*, Ebes. & B. 414; *Smith v. Jameson*, 5 T. R. 601.

It would be no answer to the owner of the money, who, waiving the tort, sued for money lent, or money had and received to his use, that what was paid in was money, or that money has no ear-mark, and that it went in payment of the balance due from the partner paying it to his copartner. This was precisely how the proceeds of plaintiff's property had been applied, as between the copartners, in *Vanderwich v. Summerel*, *ut supra*, but with knowledge of the other copartner, and he was compelled to account for it.

But it is entirely consistent with the case of *Ex parte Apsey* that the innocent partner knew of the advance of the money to the firm by his copartner, though he did not know of the breach of trust committed by him in paying it in. It is also

wholly consistent with that decision that the innocent partner assented to and accepted this payment of money, and relied upon its being the proper money of his copartner, and acted upon such reliance in his dealings with his copartner, subsequent to the advance of the money to the firm.

If these facts existed, on which the report is silent, but which, perhaps, may be inferred, upon the general presumption that a merchant keeps himself informed as to his own business affairs, then there is a view of the case which gives the innocent partner an equity to deny his liability for the money, although his firm had the use of it. In such a case, especially if the partner paying in the money is indebted to his copartner on the firm accounts, the innocent copartner may, perhaps, say to the real owner of the money: "It is true this was your money and my firm has received it, and given no consideration for it as a firm, but I received it from the hands of my copartner as money. The law allowed me to rely on his possession of it as proof that it was his own money. I did so. I applied it in our accounts, to the discharge of his indebtedness to me, on firm account. I forbore to press him to make good his account. I have dealt with him ever since, with the same reliance and belief that it was his money. I have kept him as my partner, which I might not otherwise have done. I have given him credit, and now, if you reclaim the money as yours, I shall be injured and put in a worse position, for having relied on his possession as proof of his title, which, by law, I had a right to do, and must, by the law, be protected in doing."

In other words, if, in the case supposed, the innocent copartner has an individual equity, by reason of which the firm should not, on account of his rights, and for his protection, be held liable for the receipt and appropriation to itself, without consideration, of another man's money, it must be exactly that equity which any other party receiving it as money could plead on his behalf, as against the owner, to-wit: that he has received it in payment of a debt, or for the purchase of something of value, which he has parted with in exchange for it, or that he will suffer some injury by reason of his relying

on the apparent title made by the actual possession of it, which injury may be equivalent to the parting with value. For, as pointed out above, and illustrated by the authorities cited, money is, in all things, a chattel, and subject to the law which governs other chattels, except so far as it has the peculiar attribute of money in carrying its title by delivery from hand to hand, and that exception is only made on grounds of public policy for the protection of those who take it as money.

The case of *Ex parte Apsey*, therefore, if it can stand as an authority consistently with more recent decisions, is not an authority for the position that the firm of Ketchum & Belknap could defend against a suit by Morris Ketchum for his money misappropriated by Belknap to the use of the firm, since here it is clearly proved that Franklin M. Ketchum did not even know, till the fraud itself was discovered by him after the failure, that his partner, Belknap, had paid in the money at all. It appears by the proofs that Belknap had exclusive charge of the financial affairs of the firm, and the raising of money for its use; that he alone kept the books; that Franklin M. Ketchum never examined the books, or knew what was in them; that the only entries of these transactions in the books until after the failure, when Belknap wrote them up, was the memorandum of the deposits made in the bank account of the firm in its check-book, where were minuted, among other sums deposited, these sums in question, against some of which were placed the initials "M. K.," denoting to Belknap that it was Morris Ketchum's money, but with nothing to show whether the sums deposited were moneys borrowed or received for debts due the firm, or belonging to the individual partners. Nor, so far as appears, was Belknap ever credited in his account on the firm's books with these sums as money contributed by him. Nor does it appear how his account stood at the time these advances by him to the use of the firm were made.

Thus, a more complete case of the total want of those elements which are necessary to make out an equity on Franklin M. Ketchum's part to this money, on the ground that he,

as between himself and his copartner, took it as money, could not well be made out.

If it is suggested that the mere payment of money into the firm operated *ipso facto*, and because it was money, as a discharge of that amount of the indebtedness of Belknap to his copartner, whether the copartner knew of it or not, and whether he consented to it or not; it may be answered, so far as this case is concerned, that it is not proved that Belknap was then indebted to his copartner in account; but if the parties desire to have the true state of that account appear, in case of an appeal, leave will be given to show the facts. But another answer is, that to hold that payment of the money in, without the knowledge and consent of the copartner, operates, because it is money that is paid in, as a payment, would simply be to apply to the case blindly, and without regard to its reason and nature, the maxim that money has no earmark.

As above pointed out, this rule goes no further than this in protecting the receiver of money, and extinguishing the former title; that the title changes only where the money is received as money, with the *bona fide* belief on the part of the receiver that it was the money of the party paying it. Clearly, Franklin M. Ketchum, if his rights as an individual, in his relations to his copartner, are considered—and it will be observed those are the only rights entitled to consideration—was not such a receiver of this money. It must not be lost sight of in this matter that if the firm is not liable for the money received and used by the firm, through Belknap, with full notice of the rights of Morris Ketchum in it, it is an exception from the well settled rules of the law of partnership, which, for strong reasons of public policy and justice, make the act of one partner, in the course of the firm's business, the act of all, and the knowledge of the one partner, in the like case, the knowledge of all; and the equity of the innocent partner, which is strong enough to countervail and override this well settled and just rule of law, must be a real equity, based on the actual existence of facts, which would ren-

der the application of the ordinary rule of law in the particular case inequitable and unjust.

The suggestion, in *Ex parte Apsey*, that *no contract arises*, cannot be understood as basing the objection merely on the circumstance that there is no promise to repay the money on the part of the firm, but simply that, upon the case made, no implied promise is raised by law; for the action for money had and received, as is well settled, does not rest on privity of contract. It lies wherever one man has, or has received, money which, *ex æquo et bono*, he ought to repay. The common case of money paid under mistake of fact is a good illustration of this; and where trover will lie for the conversion of property, and it has been turned into money, the owner may waive the tort, and bring his action for money had and received. In such a case the law implies a contract to repay, where the party has no equity to retain, the money, or the proceeds of property. *Scott v. Surman*, Willes, 404; *Mason v. Waite*, 17 Mass. 563.

What is meant by the suggestion of the learned chancellor is, therefore, simply that the case was not one in which the law would imply a promise to repay the money. The views above expressed, as to the necessity of the receiver of money having given a valuable consideration of some kind in order to hold it, or protect himself against an action for it if spent, and as to the true distinction between money and other chattels, are confirmed by the case of *Lime Rock Bank v. Plimpton*, 17 Pick. 160.

The case of *Marsh v. Keating*, 1 Bing. N. C. 198, cannot, I think, be distinguished in principle from the present case. One Fauntleroy, a partner of the defendants, by means of a forged power of attorney, procured the transfer of the plaintiff's stock and sold the same, and paid the proceeds into the bank account of the firm. He kept the pass-book of the bank in his own custody, and took measures to prevent the deposit from being entered in a book called "the house-book," which was accessible to the defendants, and which, in the due course of their business, should have shown the deposit also.

By this and other devices he concealed entirely from his

copartners the receipt of the money, and afterwards checked it out himself and used it for his own purposes. In the pass-book it was entered "cash per Fauntleroy." The defendants reposed great confidence in Fauntleroy, and allowed him almost exclusively to attend to the banking business. This and other forgeries being discovered long afterward, and Fauntleroy having been executed for some other forgery, the plaintiff sued defendants, his surviving partners, to recover the money paid into the bank. They were shown to be wholly guiltless of the fraud, and to have had no use of the money, except that it had been paid into their bank in the usual course of their banking business by Fauntleroy. No entry of the money appeared in any of the books of the firm except the pass-book, and that they never saw, and never in fact knew of the deposit.

The defendants were held liable on the ground that the firm received the plaintiff's money and had it under their control by being paid into their bank account; that the fraud of their partner, Fauntleroy, afforded no answer to the plaintiff's claim, after the money had once come into their power. The court say: "It must be admitted that they were so far imposed upon by the acts of their partner as to be ignorant that the sum above mentioned was the produce of the plaintiff's stock; but it is equally clear that the defendants might have discovered the payment of the money, and the source from which it was derived, if they had used the ordinary diligence of men of business. If they had not the actual knowledge, they had all the means of knowledge, and there is no principle of law upon which they can succeed in protecting themselves from responsibility, in a case wherein, if actual knowledge was necessary, they might have acquired it by using the ordinary diligence which their calling requires."

The case of *Ex parte Apsey* is not cited, but is consistent with the case of *Marsh v. Keating*, that if the defendants had known of the payment into the bank, and, using ordinary diligence, had not discovered the fraud, and had been in fact misled, by the payment being made in money, into believing that the money was Fauntleroy's, and had, in reliance

thereon, dealt with him as their copartner accordingly, and applied it to his account, that they might have been relieved.

The case discloses that the plaintiff was a customer of the defendants' firm, but the liability of the defendants is not rested at all on any fiduciary relation between the firm and the plaintiff, as respects her stocks, but wholly, as it seems, on the receipt of her money.

The case also suggests another ground on which the firm of Ketchum & Belknap must be held liable; that, as Franklin M. Ketchum deliberately left to his copartner all that part of the business which related to the raising of money, he is chargeable with the knowledge of all such facts as he might, with ordinary diligence in attending to his business, have discovered. He constituted Belknap his agent to raise money for the firm. It seems reasonable that he should be held liable, civilly, of course, for what Belknap did in that respect; at least, so far as he might, with reasonable diligence, have discovered the facts. He did not seek to know what Belknap did, or how or where he got money for the firm. The rule laid down in *Marsh v. Keating*, for such a case, is the only safe rule of business, since, if the rule were otherwise, partners might purposely keep themselves ignorant of what their partners did, in order to avail themselves of their frauds by reason of their ignorance, and it would be almost impossible to detect such a fraud. Equity helps the diligent. The rule is, also, in accordance with the principle that pervades the law of principal and agent, that the principal is liable, civilly, for the acts of his agent, done in the conduct of his business.

The other case relied on by the opposing creditor is *Jacques v. Marquand*, 6 Cow. 497. In that case one member of a firm had misappropriated the plaintiff's property, which he had held upon a special trust, and had used the proceeds in paying debts of the firm; and he pleaded, in abatement, that the other partner was not joined as a defendant. The evidence showed that Paulding, the defendant's copartner, lived in New Orleans, and the defendant in New York, and Paulding knew nothing of the transaction. The court cited



*Ex parte Apsey* for support of the general proposition, which the opposing creditors maintain here, that the payment of money into the firm by the guilty partner does not raise an implied contract to repay on the part of the firm. The distinction above pointed out between this case and Apsey's case existed in *Jacques v. Marquand*, but it was not adverted to by the court.

The real point in the case, however, was not whether the firm was liable, but whether Marquand was individually liable. The firm might be liable, and yet Marquand, as the actual wrong-doer, who first misappropriated the money, might still continue individually liable. But, so far as the *dicta* of the learned judge are inconsistent with the views herein expressed, as applicable to the present case, I am unable to concur in them. The case has been several times cited and distinguished, but the precise case seems not to have arisen again. *Whitaker v. Brown*, 16 Wend. 509; *Hutchinson v. Smith*, 7 Paige, 33; *Willett v. Stringer*, 17 Abb.N.S. 155. The chancellor, in *Whitaker v. Brown*, seems to take pains to restrict the authority of *Jacques v. Marquand* to the precise point that the defence of non-joinder was not good, and the later cases in which it is cited certainly add nothing to its authority.

The point made by the opposing creditors, that Franklin M. Ketchum, or the firm, is not liable because Belknap, after the deposit of these moneys, drew out all or some of them for his own personal uses, is untenable. If, by the receipt of the money, the firm was made chargeable with it, it is no answer that the firm was afterwards robbed of it, or a part of it; much less that a member of the firm, being authorized to draw checks on the firm's bank account, abused that authority by drawing for purposes not authorized by the agreement between the partners. If any authority is needed for this proposition, the case of *Marsh v. Keating*, cited above, which was a much harder case than this for the deceived partner, is sufficient.

The claims, therefore, of Morris Ketchum, set forth in the proofs of debt, those proofs being properly amended, unless

amendment shall be waived, must be sustained on the ground that Franklin M. Ketchum, the innocent partner, on the facts proved, appears to have no equity to avail himself of the payment of the money to the firm, as a payment between himself and his copartner, of money in settlement or adjustment of any balance due to him on account of the partnership business, or as a payment of money to him upon any consideration whatever, in receiving which he relied upon his copartner's possession as proof of ownership.

They must also be sustained on the further ground that Franklin M. Ketchum gave his copartner full and unrestricted authority to raise more money for the use of the firm, without exercising any supervision over his acts in that respect, and without inquiring or seeking to discover how and from what sources his copartner raised money for the firm; that, therefore he is liable, by the law of principal and agent, for the acts of his agent done in the performance of this agency, whether in the making of contracts or in the tortious intermeddling with the property of others, including money, at least to the extent to which he could, by reasonable inquiry, have ascertained the truth; and in this case the circumstances warrant the inference that a very slight attention on his part to the business would have discovered to him the source from which the money came.

But, while the entire claims must be sustained on these grounds, it is evident that the transfer of the money from Morris Ketchum's bank account, and the hypothecating of his securities for a loan to the firm, must be sustained on other grounds. These were not, either in form or substance, payments of money into the firm by Belknap within the rule in Apsey's case, whatever may be the extent and limits of that rule.

The checks drawn against Morris Ketchum's bank account have, by consent of counsel, been produced since the argument, and it appears that they were checks signed "Morris Ketchum, per T. Belknap, Jr., Attorney," and payable to the order of "Ketchum & Belknap."

The deposit of these checks, with other funds, in the bank,

was an act of Belknap in the regular course of the business of the firm. Franklin M. Ketchum, as a partner, is clearly chargeable with notice of the form of the deposit and of the form of the checks deposited, for that deposit was unquestionably a firm transaction, and the checks on their face do not import any title to the money in Belknap. On the contrary, they show that up to the very moment of the deposit the money deposited was Morris Ketchum's money. All that the papers on their face and the acts of Belknap purport to show is that Morris Ketchum had this money in the Fourth National Bank, and that it was his own money, and that Belknap, by drawing the check, represented that he had authority from Morris Ketchum to draw it out and pay it into the firm of Ketchum & Belknap; but whether as a loan or as a gift, or in payment of a debt due to the firm, neither the papers nor the account show at all.

While, therefore, if Franklin M. Ketchum had seen the checks, he might possibly have been misled into believing that Morris Ketchum had given Belknap authority to draw out the money and pay it into the firm, it would have been his own folly; and it would not have been any proper inference to be drawn from the facts if he had concluded that the money had in any way become Belknap's. If Belknap had deceived him as to his authority, so far as the form of the check imports authority, it would have been clearly his misfortune, and would not have affected Morris Ketchum's rights. Besides, there was no payment of money to the firm till the check was collected, and this was done by the firm. In fact, both deposits were in the same bank, and the transaction was a transfer from the account of one depositor to that of the other. That transfer was effected after or simultaneously with the deposit of the checks.

That the deposit of the checks by Belknap was a firm transaction, done by him as a partner, and not by him as an individual, is too plain for argument. By that very act, and as an inseparable part of it, and not before it, in order of time, the money of Morris Ketchum was appropriated to the use of the firm. It is impossible to say that the deposit was an

act of the firm and the transfer of the money was not. The two things may be abstractly considered as separate acts, but they were in reality one act, and the firm cannot take the benefit of the one without being responsible for the other.

The case thus differs from the case of the proceeds of the securities sold and the money afterwards paid in. In that case Belknap individually converted the property into money, and then, having the money in hand, paid it in. Here Belknap never had the money, or what purported to be the money, held by him as his own, but he held what purported to show that the money belonged to the firm, or to Morris Ketchum, himself; and the firm, not Belknap individually, converted the money, and appropriated it to their own use. If the checks had been drawn by Morris Ketchum, payable to Belknap's order, and by him indorsed to the firm, there might be some ground for holding that the firm received money from Belknap; but on these facts they received what did not purport to be his money, and cannot, as to this part of the case, invoke in their defence the rule that they are not liable to repay money paid in by a partner, which in fact belongs, without the knowledge of the other partner, to a third party.

Similar considerations apply to the stocks hypothecated to the bank for a loan. The raising of money by loan was a firm transaction, especially committed by the firm to Belknap. He pledged certain securities, which may be assumed to be in such form that they passed by delivery. He presented them to the bank in this form. Nothing else appears as to any representation of title. The borrowing and the pledge were one act. The firm converted the securities by hypothecating them. One of the partners, as a member of the firm, handed them to the bank as securities of the firm.

The transaction did not purport on its face that the securities were Belknap's, but rather that they were the firm's. If Franklin M. Ketchum had been present and witnessed the transaction there would have been no more reason for him to conclude that they were Belknap's than that they were the firm's. The ordinary presumption that a man knows his own business, and, therefore, that he knew the firm owned

no such property, cannot be drawn in this case, because, on the proofs, Franklin M. Ketchum knew and sought to know nothing of the financial affairs of the firm. He left all that to Belknap. The firm bought and sold and held in their own right stocks. For aught that Franklin M. Ketchum knew Belknap might have bought these stocks for the firm. The circumstances were not such, if they had been known to him, as to justify any inference that the securities were contributed to the firm by Belknap. I see no reason, therefore, why the firm should not be held liable for the conversion of these securities.

It is unnecessary to consider the further question raised and argued whether the entry of these claims as debts in the bankrupt's schedules were such an adoption of them as would alone make the firm liable.

The proofs of debt may be amended conformably to this opinion, then stand as valid claims.

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IN THE MATTER OF FRANKLIN M. KETCHUM and others,  
Bankrupts.

(District Court, S. D. New York. January 12, 1880.)

**BANKRUPTCY—PETITION FOR DISCHARGE—NEW NOTICE TO CREDITORS.**

While a case is still before a register it is competent for the bankrupt court to order that the register adjourn proceedings, on petition for a discharge, to another day, and that a new notice be issued to creditors to appear and show cause, where a bankrupt firm has been held liable for a doubtful but duly scheduled claim, in order that other creditors, in the like position, though not named in the schedule, may have an opportunity to be heard.

*O. E. Bright*, for motion.

*C. W. Betts*, for F. M. Ketchum.

*C. W. Bangs*, for Morris Ketchum.

CHOATE, J. This is an application of one Elizabeth Wyck-off, an alleged creditor of the firm, who has filed a proof of debt since the adjourned return day of the order to show cause, upon the petition of the bankrupt Ketchum for his discharge, to be allowed to file it *nunc pro tunc* as of the

adjourned return day, in order that her debt may be reckoned among the debts on the question of the bankrupt's discharge. The excuse given for failure to prove the debt earlier is that she was advised that her claim was against the bankrupt Belknap alone. But after she received this advice she learned that Morris Ketchum, father of the bankrupt Ketchum, made proof of a large debt, upwards of \$26,000, which he has been allowed by stipulation of the parties to prove *nunc pro tunc*. She now has ascertained that her claim is of the same nature as that of Morris Ketchum, and if his is provable against the firm, she is advised that hers is also. The case is still before the register, no report having been made to the court. This claim of Morris Ketchum was set forth in the schedules. The petitioner's claim was not so set forth. It is very large in amount, exceeding \$100,000, and is for money fraudulently transferred by Belknap, her agent, to the firm's bank account. Morris Ketchum's debt has been contested by other creditors, including Mrs. Wyckoff, on the ground that it is the debt of Belknap alone and not the debt of the firm, but it has been held to be a valid debt of the firm, and therefore it is entitled to be computed in determining whether the requisite number and proportion of creditors assent to the discharge. The question whether these debts were of a nature to be provable against the firm was certainly a doubtful one, the doubt relating both to the facts and the law of the case. The circumstance that Morris Ketchum's debt was included in the schedule and Mrs. Wyckoff's was not, was calculated to give him an advantage over her as a creditor, whether so intended or not. The question of the discharge is of great importance to the creditors, because there are but small assets, and under all the circumstances, I think it is just and right that the petitioner, as well as Morris Ketchum, should participate as a creditor, if her debt shall finally be established, in the determination of the question whether the requisite assent shall be given. Her consent that his proof be filed *nunc pro tunc* was asked and given, and thereby he is enabled to participate in the decision of this question. As the case stands her debt will not be counted.

*In re Borst*, 11 N. B. R. 96; *In re Read*, 19 N. B. R. 232. But as the case is still before the register it is competent for the court, if justice requires it, and if by mistake, accident or otherwise, under the notices given to creditors of the hearing on the application for a discharge, creditors have failed to appear, to direct a new notice to be given, so that a just and fair vote of the creditors may be had. The case is under the control of the court, and creditors who show sufficient cause for their not appearing may be relieved. In this case it is proper that, after the determination of the much disputed question of the firm's liability litigated upon the re-examination of Morris Ketchum's proof of debt, a new notice should issue, that other creditors in the like position, but not named in the schedule, may have an opportunity to be heard.

Ordered, that the register adjourn the proceedings on petition for a discharge to another day, and that a new notice be issued to creditors to appear and show cause.

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*In Re KETCHUM.*

(District Court, S. D. New York. February 6, 1880.)

**BANKRUPTCY—SEAT IN NEW YORK STOCK EXCHANGE.**—A seat in the New York Stock Exchange is property which passes to an assignee in bankruptcy, and the court will require the bankrupt to make a transfer of the same.

*O. E. Bright*, for assignee.

*C. W. Betts*, for bankrupt.

CHOATE, J. This is an application for an order requiring the bankrupt Ketchum to make a transfer of his seat in the New York Stock Exchange to the assignee in bankruptcy, or to such person as the assignee may procure as a purchaser of the seat. The real question is whether the right or privilege, which a bankrupt holds as a member of this stock exchange, is to be regarded as property which passes to his assignee in bankruptcy, under the bankrupt law, for the benefit of his creditors. If it is, then whatever it may be necessary for the

bankrupt to do to make the right available to the assignee he will be required to do.

I think the case cannot be distinguished in principle from the case of *Gallagher v. Lane*, 19 N. B. R. 224, in which it was determined that a Washington market lease was property that belonged to the assignee. As in that case the consent of the city was necessary to a transfer, so here the consent of a committee of the stock exchange is necessary to a transfer of this right. The seat, however, has an actual pecuniary value, which the rules of the society, as interpreted and applied in practice, permit the holder to realize, by a sale and transfer. There is no practical difficulty in effecting a transfer of this right or interest for a pecuniary consideration, subject to the condition that the debts of the present holder to members are first paid; and the right or privilege is to all intents and purposes a business right or privilege, useful for business purposes only. I see nothing in the rules of the exchange which renders it impossible for the seat to be disposed of by the assignee in bankruptcy, with the co-operation of the bankrupt, subject to the condition above mentioned.

The equity of the creditors in the matter is as obvious as in the case of the market lease. This seat in the board was actually used as part of the business capital of these bankrupts as stock-brokers. To suffer the bankrupt still to hold it virtually withdraws several thousand dollars in value of their business assets from the creditors.

In the case of *Hyde v. Woods*, 4 Otto, 523, I understand it to be distinctly intimated that membership in a stock board, where the transferee of a seat cannot become a member except by election, is property which will pass to the assignee in bankruptcy, subject to a similar condition as to debts due to other members. The provision giving members a right somewhat in the nature of life insurance, is merely an incident of membership and a mere contingency, and does not, in my judgment, take this business privilege or asset out of the category of business property. I think this particular feature



of the case is not enough to distinguish it from *Hyde v. Woods*.

The case of *In re Sutherland*, 6 Biss. 526, can, perhaps, be distinguished from *Hyde v. Woods*, and from *In re Gallagher*, on the ground suggested in the latter case, that the right in that case was less distinctly of a mere business character. But if not, I am not satisfied, by the reasoning in that case, that property like this seat in the New York Stock Exchange was not intended to pass to the assignee in bankruptcy, under the bankrupt law.

The controlling consideration is, as it seems to me, that practically, and whatever its form or incidents with respect to other matters may be, it is a part of the bankrupt's business assets, or more generally of his property, which it was the primary design of the bankrupt law to distribute among his creditors, and that the peculiarities which distinguished this from other property are, in view of the evident purpose and scope of the bankrupt law, unessential; mere technicalities—cob-webs—which the law is strong enough to break through.

Let an order be entered requiring the bankrupt to execute any transfer, assignment, or other instrument necessary for the purpose of vesting the title to his seat in the New York Stock Exchange in such person as the assignee in bankruptcy may procure as transferee.

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IN THE MATTER OF JAMES R. NICHOLS.

*District Court, S. D. New York. March 9, 1880.*)

BANKRUPTCY—DISCHARGE—JURISDICTION OF COURT—SEAT IN STOCK EXCHANGE—REV. ST. §§ 5604, 5051.—A bankrupt cannot be compelled, after his discharge, by an order of the court having jurisdiction of the bankruptcy proceedings, to execute such instruments as may be necessary to enable the assignee to make available, as assets of the bankrupt's estate, a seat in the New York Stock Exchange held by the bankrupt at the time of the filing of his petition.

*Alex. Thain*, for motion.

*Knox & Woodward*, contra.

CHOATE, J. This is an application to compel the bankrupt to execute necessary instruments to enable the assignee to make available, as assets of the bankrupt's estate, a seat in the New York Stock Exchange held by the bankrupt at the time of the filing of his petition.

More than three years before this motion was made the bankrupt was discharged. He has now appeared by counsel, and takes the objection that since his discharge he is not subject to the summary jurisdiction of the court, nor can be compelled by an order in the bankruptcy proceeding to execute writings or instruments to enable the assignee to demand, recover and receive the property assigned. He also claims that in this case it was determined by the court that the seat in the stock exchange was not property to which the assignee is entitled. This decision is claimed to have been made in passing on the application of the bankrupt for his discharge.

An examination of the record, however, shows that the specifications of the opposing creditors were for wilfully and fraudulently omitting this item from his schedule, wilfully swearing falsely to the truth of the affidavit annexed to the schedule which omitted this asset, and wilfully swearing falsely in his examination that he had no other property than that named in the schedule. It is evident that the overruling of these specifications as not proved, and the granting of the discharge, were not a determination of the question whether or not the seat was an asset of the estate in bankruptcy. The charges were of *wilful* and *fraudulent concealment*, and *wilfully false swearing*. And it is clear that, to find these charges proved, the court must have been satisfied that the bankrupt, *knowing* and *believing* that the seat was property to which his creditors were entitled, intentionally omitted it from his schedule, and wilfully swore falsely about it. The objection that the question is *res adjudicata* must, therefore, be overruled.

The objection that the bankrupt is liable to the summary order of the court, such as is now asked for, only before his discharge, is, I think, well taken. Revised Statutes, § 5604, provides: "The bankrupt shall at all times, until his dis-

charge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do all acts required by the court, touching the assigned property or estate, and to enable the assignee to demand, recover and receive all the property and estate assigned, wherever situated. For neglect or refusal to obey any order of the court the bankrupt may be committed and punished as for a contempt of court." This was part of section 26 in the original act. By section 14, which defined the title and powers of the assignee, it was also provided that "the debtor shall also, at the request of the assignee, and at the expense of the estate, make and execute any instruments, deeds and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt." This is re-enacted in the revised statutes as section 5051. In the case of *In re Dole*, 11 Bl. 499, it was held that the summary power of the court to compel the bankrupt to submit to examination under section 26 was limited to the time prior to his discharge, and that the discharge was the termination of his proceeding, so far as he is concerned.

The argument is still stronger against the exercise of the summary power to compel the execution of papers after the discharge, because this part of the section contains the words "until his discharge," which seem designed to limit this very power. The provision cited above, from section 14, does not enlarge the power of the court. The provision in section 26 is evidently intended to give a remedy for enforcing the duty imposed on the bankrupt by section 14, which declares it to be his duty to make and execute all such necessary instruments at the request of the assignee. Construing them together as parts of a single law they are, it would seem, subject to the same limitation that the act required to be done is to be done during the pendency of the proceeding and before the discharge. The use of the word "debtor," instead of "bankrupt," in section 14, is relied on as giving that section a more liberal construction. But I cannot see how it has any such force. After his discharge the former bankrupt is no longer a "debtor," any more than he is a "bankrupt."

Whether, in a suit in equity, the assignee can now have any relief against the former bankrupt to compel his aid, if required, in realizing the value of this asset, it is unnecessary to determine. Having failed to ask, within the time limited by the statute, for the summary aid of the court for the purpose, he cannot have any relief in this form.

Motion denied.

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IN THE MATTER OF SIMON MOSES.

(*District Court, S. D. New York. March 4, 1880.*)

**BANKRUPTCY—PROPERTY SUBJECT TO ASSIGNMENT—TITLE OF THIRD PERSON—IN RE BEAL, 2 N. B. R. 587.**—Whatever money or property is in the possession of the bankrupt at the time of filing his petition, which he is actually using and holding as his own, passes to his assignee in bankruptcy, and he cannot set up in defence to the claim of the assignee the title of a prior assignee under a general assignment for the benefit of creditors, merely for the purpose of retaining such property in his own possession.

*G. A. Seixas*, for creditors.

*F. R. Lawrence*, for bankrupt.

**CHOATE, J.** This is an application on the part of creditors of the bankrupt, by petition, to compel the bankrupt to deliver to the assignee certain moneys and property alleged to be in his possession at the time of filing his petition in bankruptcy and not delivered to his assignee. The bankrupt has answered, denying that he had any such money or property; but he now objects to any further proceedings, and moves to dismiss the petition on the ground that, upon the case as stated in the petition, the assignee in bankruptcy has no title or claim to the property, but that, if the bankrupt still holds it, it belongs to his assignee under a voluntary assignment for the benefit of creditors, executed before the filing of the petition in bankruptcy.

The case made by the petition is shortly this: The general assignment for the benefit of creditors was executed December 19, 1877. The petition in bankruptcy was filed June 27, 1878. At and prior to the making of the general assignment

the bankrupt had a large amount of money and personal property, which, with the knowledge and connivance of his voluntary assignee, and to defraud his creditors, he was permitted to use as his own in continuing his business. That part of his property, if any, which he did deliver to the voluntary assignee was delivered in form only, and really remained subject to the control and use of the bankrupt in his business, the assignee permitting the money to be deposited in a bank account opened in his name as assignee, and to be drawn out by or for the use of the bankrupt, and for the bankrupt's own business purposes. The bank account of the assignee was, on the case made, a mere blind for creditors.

This state of things continued till the assignee died, having rendered no account, and having to his credit, in the bank, only about \$500. A new assignee has, since his death, been appointed by the court, having jurisdiction of the trust, on the application of the present petitioners. The moneys and property now alleged to be in the hands of the bankrupt are the proceeds and result of the business so carried on, or, perhaps, partly the very money which the bankrupt failed to deliver to his voluntary assignee.

Upon this case I am clearly of opinion, if the facts shall be established by the evidence, that the bankrupt should be compelled to pay over and deliver the money and property to the assignee in bankruptcy. Whatever money or property is in the possession of the bankrupt at the time of filing his petition, which he is actually using and holding as his own, passes to his assignee in bankruptcy, and he cannot set up in defence to the claim of the assignee a title in a third person, merely for the purpose of holding on to it himself. If third persons have the possession this court cannot, on summary petition, order it to be delivered to the assignee. But if the bankrupt has it, it passes to the assignee, subject to the liens or rights of third persons, whatever they may be. After the assignee gets the property any third person may, by petition or suit, assert his rights in it.

If the bankrupt has property which he is using as his own the court will not be curious to inquire how he came by it.

The case of *In re Beal*, 2 N. B. R. 587, is directly in point, and was not so strong a case for the creditor as the present. In that case Judge Lowell says: "The question is one of fact whether this bankrupt had, at the time of his bankruptcy, any estate or effects which he has concealed. If he had such *de facto*, though by a defeasible title, he must set them out in his schedules, and give them to his assignee. It is not for him to rely on the title of a third person which he has not himself respected. The presumption is that he surrendered all his property in 1866; but that is a presumption of fact, and if he did not it is not important whether his motives were good or bad—whether his acts were done with the consent or concurrence, or against the will of his then assignees, and in fraud of their rights. The possession of assets, in the use and enjoyment of the bankrupt, makes a sufficient title for his assignee, until the earlier assignees shall dispute it."

Let an order be entered referring it to the register to take the proofs.

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#### IN THE MATTER OF WILLIAM S. CORWIN.

(*District Court, S. D. New York.* April 8, 1880.)

**BANKRUPTCY—SPECIFICATIONS IN OPPOSITION TO DISCHARGE OF BANKRUPT — NEWLY DISCOVERED EVIDENCE —** REV. ST. § 5120.—Section 5120 of the Revised Statutes does not authorize a rehearing or new trial upon specifications filed in opposition to the discharge of a bankrupt heard and determined before the discharge, even if the opposing creditor can adduce new facts, happening since the discharge, which would be competent evidence if a new trial were authorized by the statute.

*Starr & Hooker*, for petitioners.

*H. E. Howland*, for bankrupt.

CHOATE, J. This is a petition under Rev. St. § 5120, to vacate the discharge of the bankrupt. It was filed within two years after the discharge was granted. It appears by the petition that these petitioners filed specifications in opposition to the discharge, which were tried, and resulted in a

decision in favor of the bankrupt. The petition sets forth, as grounds for avoiding the discharge, some of the same specifications only. It also alleges facts which, if true, tend to show that certain acts of the bankrupt since he obtained the discharge would, if the trial of the specifications were now had, be competent evidence in proof of the specifications. The petition does not allege that the petitioners had no knowledge of the acts alleged in the specifications as grounds for avoiding the discharge before the same was granted.

The bankrupt has appeared and objects that the petition states no case against him, under section 5120, which he should be required to answer.

I think it is clear that section 5120 does not authorize a rehearing or new trial upon specifications heard and determined before the discharge, even if the opposing creditor can adduce new facts, even the conduct of the bankrupt happening since the discharge, which would be competent evidence in case of a new trial, or a discovery since the discharge of new evidence, tending to support the specifications. The evident purpose of section 5120 was to give creditors who had failed to oppose the discharge, for the reason that they had no knowledge before the discharge that the grounds now alleged for opposing it existed, an opportunity within two years to make the necessary charges and to prove them.

The privilege given is not so broad as the right to a new trial on newly discovered evidence, and I think it cannot be claimed that a creditor, who, before the discharge, filed specifications setting forth, by way of charge against the bankrupt, fraudulent acts, had no knowledge of those acts. He necessarily had such knowledge of them that he was able to allege them; and it must be assumed as against him that he alleged them in good faith, and upon such information as justified him in doing so. This section does not provide that the creditor must have had no knowledge of all the evidence which may be produced to support the charges, but no knowledge of the fraudulent acts charged. It is based on the theory that if the creditor knows of the fraudulent acts, then, with the power given by the act to examine the bankrupt

himself, and to produce other testimony, he has a sufficient opportunity to prove them so as to defeat a discharge. But, if he has no knowledge whatever of the acts, his failure to file specifications is excused, and he will be heard to make the charge afterwards within two years. This seems to me to be the reasonable construction of the section. Any construction, in effect, conferring a right to a new trial as between the same parties, upon the same case before tried, upon newly discovered evidence, would take from the discharge, as it seems to me, that finality which, except as to creditors really having no knowledge whatever of the existence of valid grounds for opposing the discharge, it was intended to have.

Petition dismissed.

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ABENDROTH v. DURANT.

(*District Court, S. D. New York. April 14, 1880.*)

**BANKRUPTCY—RES ADJUDICATA—ESTOPPEL.**—An assignee in bankruptcy is not estopped by the record of a personal judgment.

*Wm. H. Arnoux*, for plaintiff.

*C. Norwood*, for defendant.

CHOATE, J. This is a suit brought by the assignee in bankruptcy of John Griffith and George W. Wundrum, who were adjudicated bankrupts as partners composing the firm of Griffith & Wundrum, against the defendant, to recover the sum of \$955.15, alleged to be due for work, labor and material furnished by the firm to the defendant before the bankruptcy. The only defence attempted is that the firm of Griffith & Wundrum consisted of John Griffith, George W. Wundrum and William P. Abendroth, and not of John Griffith and George W. Wundrum alone, and that, therefore, the adjudication of these two bankrupts as composing the firm, and the appointment of the plaintiff as their assignee in bankruptcy, are wholly void, on the ground that the statute only authorizes, in case of copartnerships, the adjudication of



all the copartners; and to sustain this defence there has been produced in evidence the record of a suit in a state court, commenced by the present defendant, Durant, as plaintiff, against Griffith, Wundrum and Abendroth, since the adjudication and appointment of the assignee in this matter, which record, it is claimed, estops the plaintiff in this action to deny that he, together with Griffith and Wundrum, constituted the firm.

The suit was on promissory notes of the firm of Griffith & Wundrum. The complaint alleged that Abendroth, Griffith & Wundrum constituted the firm. Abendroth alone appeared and defended the action. In his answer he denied that he was a general partner in the firm of Griffith & Wundrum, and alleged that said firm was a limited partnership, under the laws of New York, and that he was the special partner. It does not appear by the record that the defendants Griffith & Wundrum were served with process, but it is recited that they made default. The issue raised by the answer was tried and determined in favor of the plaintiff in that suit. The finding of the court was that Abendroth was a general partner, and the plaintiff had judgment, which was affirmed by the court of appeals.

It is contended on the part of the defendant that this adjudication in the state court, being on the precise question as to whether Abendroth was a general partner, and being later in time than the adjudication of the bankruptcy court that the firm was composed of Griffith & Wundrum alone, is conclusive against Abendroth, so that he cannot dispute or question the fact so found against him. But it is a complete answer to this alleged estoppel that the present suit is not brought by Abendroth individually, but by him in his representative capacity, as assignee in bankruptcy. A judgment estops only the parties to the suit, nominal or real, and their privies; and the plaintiff in this suit is not the same person or party who was defendant in the suit in the state court. Abendroth sues here as representing the estate of the bankrupts. He is suing merely as trustee, or as an officer of the court, and his rights, as such trustee or officer, are the rights

of the creditors of the bankrupts. It is a mere accident that he and not another happens to be the assignee, who by virtue of his office must sue, and the rights of the estate he represents cannot be affected by his being personally estopped, as against this defendant, to deny that he was a member of the firm, if such is the fact.

The judgment in the state court was against Abendroth alone. It cannot, therefore, be said to be a conclusive determination against Griffith & Wundrum, named as defendants in the summons and complaint, and against Abendroth, as being in privity with them. Nor could a judgment by default against them operate as an estoppel against their successor in interest, in a suit in another cause of action. "A judgment by default only admits, for the purpose of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim." *Cromwell v. County of Sac*, 94 U. S. 356.

It is unnecessary, therefore, to determine what effect as an estoppel the judgment in the state court might have against Abendroth in any possible proceedings between him individually and this defendant, with reference to their rights as creditors or debtors of this bankrupt estate, or to consider the other points raised and argued at the trial.

Judgment for plaintiff, with costs.

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### THE DELAWARE COAL & ICE COMPANY v. PACKER.

(Circuit Court, D. New Jersey. April 13, 1880.)

#### PATENT—NEW COMBINATION OF OLD ELEMENTS—OMISSION OF CLAIM.—

A distinct claim for each of the constituents of a new combination of old elements will not protect such combination where there has been no specific claim for the same.

Infringement of Patent.

*F. Kingman*, for complainant.

*Judge Buchanan*, for defendant.

NIXON, J. The complainants are owners of certain letters patent, numbered 73,684, and dated January 21, 1868, issued to John Henry Wood, for "improvements on wagons for unloading coal," and have brought their suit against the defendant for infringing on the same.

The defendant, in his answer, denies (1) the novelty and usefulness of the patent, and (2) the alleged infringement.

The complainant's patent is for a mechanism to accomplish a certain result, to-wit: the unloading of coal, or other material, from wagons. The inventor, in his specifications, calls it an *improvement* upon old devices for the same object, and he is entitled to have the benefit of all original devices or combinations that accomplish new and better results than existing organizations, but only for such. Whatever he has incorporated into his patent from the common property of the public, at the date of his invention, still belongs to the public. *Railway Co. v. Sayles*, 7 Otto, (97 U. S.) 554.

The first inquiry, then, will be, what is claimed as new in the complainant's patent?

The patentee says, in the schedules, that the nature of his invention consists in the funnel-shaped mouth, attached to the cart or wagon, in combination with the chute and valve. He claims (1) the attachment of a funnel-shaped or inclined mouth, D, of any material, to the rear or side of a cart or wagon, as herein described, and for the purpose set forth; (2) the valve or gate, E, at the end of the mouth, D, or in the chute or tube, G, when combined as herein described and for the purpose set forth; (3) the hinges or sliding chutes or tubes, H, when attached to an open mouth, or the end or side of a cart or wagon, for the purpose herein set forth.

He is presumed to know what he invented, and he tells us with sufficient clearness. He must stand here upon his claims; for the thing patented is what the inventor claims, and not what he shows. If he states these too narrowly, the law authorizes him to surrender the patent, and re-issue the same with ampler statements; but, until this is done, the courts cannot give him more than he asks for. *Couse & Blood v. Johnson, Black & Co.* 16 Off. Gaz. 719. He says the patent

is for a combination. Looking for the combination, we find three elements: (1) a funnel-shaped or inclined mouth, attached to the rear or side of the wagon; (2) a valve, at the end of the mouth or in the chute; and (3) hinged or sliding chutes, when attached to an open mouth, or to the side of the cart or wagon. It was not claimed on the argument that either of these elements is new. The first, standing alone, is clearly anticipated by the English letters patent, No. 2,909, and dated December 21, 1859, granted to Samuel Plimpsol, for "facilitating the unloading and transferring from railway wagons into carts, etc., coal and other matters, with which they may be loaded." The second is found in the letters patent, No. 14,301, issued to William Bell, on the twenty-ninth of February, 1856, where it is called a slide, and is used for the same purpose, and performs the same functions, as in the complainant's patent.

Indeed, it may be observed that, unless a very limited construction is given to the patent of the complainant, it is difficult to see how it can be allowed to stand at all, in view of the quite similar instrumentalities patented by Bell to accomplish the same results. He states that he has invented a new and improved method of depositing anthracite and bituminous coal in cellars, from carts and other vehicles, through scuttles in sidewalks, and that it consists in providing a conductor, and attaching the same to a hole in the bottom of a cart or other vehicle, of sufficient diameter to allow coal to pass through the same, through the coal scuttle and sidewalk, without dropping it upon the sidewalk, as before practiced, to the great annoyance of pedestrians, etc., and he claims, "a bed-plate, (attached to the under side of the tail end of the wagon,) conductor and slide, with the tube attachments, in connection with the hole in the cart or the vehicle, as set forth."

The third claim is for *hinged* or *sliding* chutes, when attached to an open mouth, or to the end or side of the cart or wagon. The proof is that *hinged* chutes, attached to an open mouth, had been used for several years anterior to the date of the application for the patent, at the trestle works of the Bel-

videre Railroad Company, at or near the eastern part of the city of Trenton, for the purpose of unloading coal from railway cars into the holds of vessels on the canal, and hence, standing alone, it must be pronounced void for embracing too much. Nor does the patentee claim that these elements, in themselves, are new, as his cross-examination abundantly shows. I find the following questions and answers on page 43 of his testimony, (Complainant's Rec., fol. 1110:)

*Question.* "Do you claim, as an original invention of yours, a telescopic tubing or chutes, independent of any connection such chutes or tubes may have with the mouth-piece?" *Answer.* "I only claim them in combination with a mouth-piece or spout, or attached to a cart or wagon."

*Q.* "Do you claim, as an invention of yours, the valve or gate, except when the same is used in combination with a chute, or tube, and the mouth-piece?" *A.* "I do not."

And at folio 1140:

*Q.* "Do you claim, as your invention, the mechanical contrivance of tubes or chutes, attached to an open mouth or mouth-piece, irrespective of the connection or non-connection of the mouth-piece with the cart or wagon." *A.* "I claim the whole combination for the purpose of unloading coal or other material."

*Q.* "Combination composed of what elements?" *A.* "Composed of one or more extension chutes or tubes, attached to the mouth-piece or spout on a wagon or cart."

*Q.* "Do each of these elements necessarily enter into and form a part of, and, when aggregated, complete your invention?" *A.* "They do, in connection with the gate or valve."

*Q.* "Do you claim that any one of these elements, separated from the others, is novel?" *A.* "*I do not think they are, but only in combination.*"

*Q.* "I understand you to claim that the combination of them all is novel; am I correct?" *A.* "You are."

Allowing the patentee, then, to explain his invention—and turning to the patent we find three separate claims for the three constituents of the combination, which he confesses are not new, but no claim for the combination itself—I know of

no principle of law which permits a patent thus issued to stand. Nothing here can be left to inference. It is the office of the claims of a patent to reveal to the world what the characteristics of the invention are for which the patentee desires protection. If he fails to state these fully and correctly, he may remedy the omission by a surrender and re-issue, but until then the court has no power to give him relief against infringers.

I do not wish to be understood as affirming that if the inventor had formulated a claim for the combination to which he refers in his schedule that such a claim would have been valid as against the older Bell patent, before spoken of. It is not necessary to decide the question, in view of the fact that no claim of that sort has been made.

Judging of this case simply from the record, and without stepping outside to ascertain the state of the art at the time of the application for the complainant's patent, I should say that the most valuable part of the invention, if not the only novel part, was the use of sliding chutes in the delivery of coal from wagons or other vehicles. If the third claim had been for sliding chutes alone, and if a combination claim had also been put in with only these as one of the constituents of the combination, it would have been a great improvement upon the Bell combination, and would clearly have anticipated the Iske patent, No. 137,371, for "improvements in extension troughs for wagons," under which the defendant justifies the alleged infringement, in so far, at least, as that patent embraced the use of sliding chutes.

And this seems to have been the view of the patentee himself, for in his examination in chief, (Complainant's Rec. p. 5, fol. 90,) in response to the inquiry as to what he claimed as the principal feature of his invention, he replied: "The third claim of my patent, which is for hinged or sliding chutes or tubes, marked H in the drawing, fig. 1, when attached to an open mouth, or to the end or side of a cart or wagon, for the purpose of unloading coal or other material from a cart or wagon directly into a cellar or vault."

It appears, in the evidence, that the inventor employed a

patent attorney to put his invention into legal shape, to whom was entrusted the duty of drawing the claims. It is unfortunate that the person thus retained did not more fully get possession of the views of the inventor, and more correctly embody them in the claims of the patent. I can give no construction to them, as they have been formulated, which will make the defendant liable as an infringer, and the bill of complaint must be dismissed.

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GREENWOOD v. BRACHER.

(Circuit Court, D. New Jersey. April 20, 1880.)

**PATENT—WANT OF NOVELTY—ESTOPPEL.**—The issuing of a patent does not estop the patentee from proving that the invention claimed therein is not novel, in the absence of bad faith in procuring such patent.

**SAME—INJUNCTION REFUSED—SECURITY REQUIRED.**—In view of the fact that the complainant does not use his patent as a monopoly, but grants licenses to others to use it, and in view of the further fact that there is some doubt on the question of prior use of the alleged improvements, an injunction is withheld in this case, if the defendant will give security for the payment of all the profits he may derive from the use of the invention and for the damages its use may cause the complainant, provided that the patent should be sustained and an accounting ordered.

Motion for preliminary injunction.

Geo. Harding, for complainant.

A. Q. Keasbey, for defendant.

NIXON, J. This is an application for an injunction, asking the court to restrain the defendant from infringing, *pendente lite*, certain letters patent, numbered 218,220, issued to John Bigelow, August 5, 1879, for improvements in sweat leathers for hats and caps.

The patent is only a few months old, and there has been no adjudication of the question of its validity, but the complainant urges that there has been such a want of good faith in the conduct of the defendant that he is justified, at this stage of the proceedings, in applying to the court for a preliminary interference.

It appears, from the bill of complaint and the accompany-

ing affidavits, that on or about the twenty-ninth of January, 1879, one John Bigelow made application to the commissioner of patents for letters patent for certain improvements in sweat-leathers for hats and caps, and that the patent was refused, because the subject-matter had already been incorporated in two several letters patent granted to Thomas W. Bracher, the defendant in this suit—one dated July 23, 1878, and numbered 206,296, and the other dated December 3, 1878, and numbered 210,489; that afterwards, to-wit, on the eighteenth of February, 1879, the commissioner declared an interference between the parties in order to determine the question of priority of invention,—the subject-matter involved in the interference being the claim of the first recited Bracher patent and the first claim of the Bigelow application, and the claim of the second recited Bracher patent and the second claim of the said Bigelow application,—the claims respectively being identical; that the usual proceedings were had thereon, and after testimony and argument the examiner of interferences rendered his opinion on the sixth of June following, awarding the priority to Bigelow; that no appeal being taken therefrom, letters patent for the invention were issued to Bigelow on the fifth of August, 1879, and numbered 218,220, and that subsequently Bigelow assigned the same to the complainant as trustee of the Blanchard Overseam Machine Company, of Philadelphia.

The bill of complaint alleges that notwithstanding such interference and adjudication of priority of invention to Bigelow, and such conclusion of the right of the parties by the proper officer of the government, the defendant still asserts that his letters patent are valid, as against the complainant, and that he is making, using and vending patented improvements, or sweat-leathers, substantially the same in construction and operation as are mentioned and described in the said letters patent of the complainant.

If the only question in the case was the priority of the invention, as between these parties, I should not hesitate to grant the injunction forthwith to the complainant. The decree of the patent office on the interference doubtless con-



cludes the defendant, as he has not thought proper to appeal from the same, after submitting himself to the jurisdiction. This was not seriously controverted by his counsel at the hearing; but the application was mainly resisted upon the ground that the defendant had discovered that the said improvements were not new either with him or with Bigelow, and that the Bigelow patent, on which this action was founded, as well as his own patent, was void for want of novelty.

A new question is thus presented, and one by no means unimportant: Will the court allow a patentee, who has lost his rights to the protection of the law in consequence of proof that his alleged invention was anticipated by others, to protect himself in the continued use of the patented improvements by showing that neither he nor the other party was the first inventor? In other words, whether the issuing of a patent estops the patentee from proving that the invention claimed therein is not novel. I think the answer depends entirely upon the fact whether the party has acted in good faith in the matter.

Every one making application for letters patent is obliged to file therewith an oath that he believes himself to be the original and first inventor or discoverer of the art, machine, manufacture, composition, or improvement, for which he solicits the patent. Section 4892 of Rev. St. This is often done honestly, and yet untruthfully, owing to the ignorance on the part of the applicant of the state of the art. I can perceive no satisfactory reason why any one should not be permitted, after he has discovered his mistake, to set up the defence of want of novelty against another party, who claims an exclusive right to patented improvements which, in truth, belong to the public. But if one with a knowledge of the state of the arts surreptitiously attempts to appropriate to himself what he knows does not belong to him, he should be estopped, when his fraud is found out, from interposing such a defence, especially against a person whom the patent office has decided, as against his claim, to be the original and first inventor.

My difficulty in this case arises from the grave suspicion,

which the testimony has inspired, that the defendant has been acting in bad faith. There is some reason for believing that, under an assumed name, he obtained from Mr. Bigelow most, if not all, of the essential devices and combinations on which he based his claims in the two patents. Whether this be so or not, it is clear from his own affidavit, read in connection with the evidence of the complainant on this motion, that ever since the decision of the interference case, establishing the invalidity of his patents as against Bigelow, he has held out to the world that his large business in hat sweats was under the protection of these patents.

The witness, G. W. Born, purchased of him in September, 1879, hat sweats, with the concealed stitch, which were marked: "T. W. Bracher; patented July 23 and December 17, 1878; improvements; patent applied for."

His circulars to the trade have been exhibited, in which these patents are recited, and under which he claims exclusive rights and privileges, and guarantees parties manufacturing hat sweats under his licenses against all suits for infringements.

Mr. Van Gelden, also, testifies that he is well acquainted with the defendant Bracher; that he is carrying on business under the firm name of T. W. Bracher Hat Sweat Co., and that he represents to the trade that he is manufacturing hat sweats under the patents of July 23 and December 3, 1878, and is fully protected by them, he being the original inventor of the improvements therein described.

Mr. Gore, of the firm of Gore, Sparron & Co., states that, until quite recently, he purchased all the prepared sweats used by his firm of the licensees of the Bigelow patent, and that he was induced to change and buy the Bracher sweats in consequence of assurances from T. W. Bracher that he was manufacturing the same sweats under his patents of July 23 and December 3, 1878, which protected him and his customers against the owners of the Bigelow patent.

Turning to the affidavit of the defendant, to ascertain what reply he has made to all this proof, we find that he is silent. He does not seem to regard it of sufficient importance to

give it any attention. Under the circumstances it must be regarded as an acknowledgment of its truth; and yet he tells us, in the same deposition, that after he learned that the patent office had declared the interference, and after he had heard the testimony taken therein, he made a thorough inquiry into the validity of both his own and the Bigelow patent, and ascertained that the same device had been used many years ago, and was not novel; that he learned this especially from the affidavits of Job W. Blackham and Henrietta Sanford, which he has put in the case, and which, he says, were taken last spring during the pendency of the interference proceedings.

With such an exhibition of the want of good faith on the part of the defendant in pretending to the possession of exclusive rights under patents which he knew were void, either because they were anticipated by Bigelow or because they were not novel, it has not surprised me that the witness on whom he principally relied (Blackham) has come forward and retracted all the substantial parts of his first affidavit, in which he testified to the prior use of the patented improvements.

Every one having experience in these matters knows how easy it is to exhibit an article of manufacture to an honest and well meaning person, and procure his affidavit that many years before he saw or made something similar to it. The witness may be quite sincere, but altogether mistaken. Some small difference may exist, too apparently insignificant to be carried in the eye or the memory, and yet of such a character as to impart to the article all that is vital or valuable in it. In the present case Blackham swears, in his deposition of May 20, 1879, that from 20 to 23 years ago, while he was foreman in the hat manufactory of I. H. Prentice, of Brooklyn, New York, he "invented and made a certain sweat band or sweat leather, for use in hats, precisely similar in every material part with a sample exhibited," to-wit, one of the Bracher sweats.

And yet, in December following, he had shown to him one of the same Bracher sweats, and then says: "No such sweats

were made by me, or at the factory of Mr. Prentice, during the time I was there prior to 1878; nor were those elements—leather band, spring reed, and attaching slip of oil silk, or other water-proof material—ever combined or used by me, or any one at the factory, as a hat sweat, prior to that time.”

It is not necessary for me to indicate now which of these opposite statements I believe; but, in view of the value that both the complainant and defendant attach to the alleged invention, it is quite as probable that the memory of the witness has failed him as to the precise character of the hat sweats made and sold nearly a quarter of a century ago, as that such an important invention should have been abandoned by the world after as many as 70 dozen per day had been manufactured for a period of two or three years.

But it is hardly necessary to pursue the matter further. Enough has been said to indicate the inclination of my mind to grant a preliminary injunction.

But the case is a peculiar one, and I should be sorry to do any injustice to the defendant in consequence of the unfavorable impression which his conduct has made. In view of the fact that the complainant does not use his patent as a monopoly, but grants licenses to others to use it, and in view of the further fact that there is some doubt on the question of prior use of the alleged improvements, the injunction will be withheld, if the defendant will give security for the payment of all the profits he may derive from the use of the invention, and for the damages its use may cause the complainant, provided that the patent shall be sustained and an accounting ordered.

Let an injunction, therefore, issue, unless the defendant, within 10 days after notice of the order, shall give bond, with sufficient security, to be approved by the clerk of the court, conditioned to keep an account of all the hat sweats manufactured and sold, and to file such account under oath, once in three months, in the clerk's office of this court and to pay the amount of any final decree in this case. The penalty of the bond to be \$20,000; or, if that sum be regarded as too large or too small, in such other amount as the court shall order after hearing the parties.

PENTLARGE *v.* BEESTON and another.

(Circuit Court, E. D. New York. April 13, 1880.)

PATENT—INJUNCTION—LICENSE.—An injunction founded upon consent, enjoining the use of an invention, is not necessarily deprived of vitality by the granting of a conditional license.

SAME—ATTACHMENT—SUIT PENDING IN STATE COURT.—An attachment will not be issued for the violation of such injunction while a suit is pending in a state court of competent jurisdiction, concerning the validity of the agreement upon which the decree for the injunction was founded, and in relation to the legality of the revocation of the license which authorized the use of the invention.

*Preston Stevenson*, for Pentlarge.

*Tracy Catlin Brodhead*, for Beeston.

BENEDICT, J. This case comes before the court, upon a motion on the part of the defendants, for the stay of a proceeding instituted by the plaintiff in this court, to punish the defendants for contempt, because of a violation by them of a perpetual injunction, whereby they were restrained from making a certain form of bungs for casks, described in a patent issued to this plaintiff, and known as re-issue No. 5937.

Of the many proceedings had in this court between these parties, arising out of this patent, the following must be mentioned, in order to an understanding of the questions presented by this motion.

In April, 1877, the plaintiff filed his bill in this court against the above named defendants, in which he set forth the issuing of the said patent, and the infringement thereof by the defendants, and prayed to be awarded damages for said infringement, and a perpetual injunction to restrain the defendants from using his invention in the future. After issue had been joined in that action, and on the third day of January, 1878, an agreement of compromise was entered into between the plaintiff on the one side, and the defendants on the other, in which it was provided, among other things—*First*, that the defendants should admit the validity of the plaintiff's patent, and his exclusive right to the invention therein described, and that the defendants should cease infringing upon his rights as sole owner of the said invention;

*second*, that the defendants should consent to a final decree in this action awarding the plaintiff the sum of \$2,000 for his damages by reason of past infringements, and directing that the defendants be perpetually enjoined from using the said invention in the future; *third*, that upon the entry of such a decree, and the payment of the damages agreed on, the plaintiff should grant to the defendants, and the defendants should accept, a license to use the said invention.

The terms of the license were particularly specified in this agreement of compromise, and one of its provisions is that in case of a failure of the defendants to pay the royalty specified therein, or maintain the selling price of the bungs at the agreed rate, the plaintiff should be entitled to revoke the license, by giving written notice of revocation to the defendants. In pursuance of this written contract between the parties a final decree was entered in this action, according to the prayer of the bill, and awarding the plaintiff \$2,000 for his damages, and directing the issue of a perpetual injunction forbidding the use of the said invention by the defendants. Upon the entry of such decree the defendants paid the damages and costs, and received from the plaintiff a license to use the invention as provided in the agreement of compromise.

Under this license the defendants continued to manufacture bungs, of the form described in the plaintiff's patent, until July 5, 1879, when the plaintiff gave notice of revocation of the license, upon the ground that it had been violated by the defendants by selling bungs at less than the prescribed price. The defendants disregarded this notice of revocation of the license and continued to use the plaintiff's invention. Whereupon the plaintiff applied to this court for an attachment against them to enforce their obedience to the perpetual injunction theretofore issued out of this court, according to the direction in the final decree herein. A reference was thereupon ordered, to take proofs respecting the acts charged upon the defendants, and also respecting the circumstances under which the notice of revocation of the license had been given. Pending that reference the defendants make the present applica-

tion that all further proceedings to punish them for contempt be stayed.

In support of this application it is first contended that the perpetual injunction was rendered of no effect by the granting of the license. But it seems plain that the granting of a license by the plaintiff could not deprive of vitality a writ of injunction issued by the court in pursuance of its final decree. In the absence of any order of the court to recall the writ, or suspend its operation, I cannot doubt that it still remains alive, and affords foundation for a commitment of the defendants, if equity requires such action on the part of the court. "Perpetual injunctions are founded on the equity of relieving a man from the necessity of bringing action after action." *Kerr on Injunction*, 44. "The operation of such an injunction may be suspended for a given time by the action of the court." *Kerr*, 47. But unless suspended or recalled by the court a perpetual injunction, issued upon final decree, continues in existence, and may be enforced at any time.

The real question raised by the license is not as to the power of the court to compel obedience to the injunction, but whether the plaintiff has not, by granting the license, acquiesced in the breach of the injunction, and so deprived himself of the right to demand a commitment of the defendants. *Mills v. Cobby*, 1 *Merriville*, 3; *Kerr on Injunctions*, 578.

Upon this question it may be said that if the understanding between the parties had been that the injunction should be superseded, there would be little difficulty in holding that the plaintiff had waived his right to demand a commitment of the defendants, notwithstanding their omission to apply for a suspension of the injunction by the court. But such could not have been the intention of these parties. The license forms part of the agreement of compromise of January 3, 1878, made prior to the entry of the final decree. That agreement provides in express terms, not only for the license, but for a final decree and perpetual injunction. The careful provisions in this contract for the issuing of a perpetual injunction forbid the conclusion that it was intended that the

injunction, when issued, should be forever inoperative, and of no avail to the plaintiff.

To suppose such an intention, is to suppose that the provision for a perpetual injunction was intended to be vain words, without meaning or effect. Moreover, the acts of the parties are not in harmony with such an understanding, for not only was a final decree directing a perpetual injunction entered upon notice, without objection, but the writ of injunction was actually issued in pursuance of the decree and served upon the defendants by the marshal, all without objection or question by the defendants. The only understanding consistent with the terms of the compromise and the acts of the parties is that it was intended that the plaintiff should make no complaint respecting the disobedience of the injunction during the existence of the license, but that in case of a termination of the license the injunction should be available to the plaintiff for the protection of his rights as fixed by the final decree.

The next position taken by the defendants is that the plaintiff himself was the first to break the agreement respecting the price at which the bungs were to be sold, and that the notice of revocation was not given in accordance with the terms of the license, or because of any substantial violation of the license by the defendants, but for the purpose of compelling the defendants to buy the plaintiff's patent.

If the defendants were now insisting upon their right to the license there might be a question whether it would be competent for the court to pass on the effect of the notice of revocation upon a motion to attach the defendants for contempt. Although in this instance the license is in writing, and no controversy exists as to its terms, the remarks of the supreme court in *Hartell v. Tilghman*, (99 U. S. R. 556,) are calculated to render it doubtful whether, in the absence of a termination of the license by mutual agreement or final decree, a revocation of the license could be held to have been effected by the notice given. But the difficulty with the defendants' position is that they now deny the plaintiff's power to grant



a license, and assert a right to use the invention described in the plaintiff's patent without regard to the license, and in fact are now using that invention under a claim of right outside of the license.

So long as the defendants maintain their present attitude in regard to the plaintiff's patent, the circumstances attending the notice of revocation of the license, as well as the effect of that notice, are wholly immaterial.

The next position taken by the defendants is that they have become entitled to have the agreement of compromise set aside, because of the discovery of a fact of which they were ignorant at the time of entering into that agreement, viz.: that there was in existence, prior to the date of the plaintiff's invention, an English patent, issued to one Taylor, for the same invention described in the plaintiff's patent; that the Taylor patent has expired, and all persons are now at liberty to use the invention therein described; that they have presented those facts to the supreme court of this state by a suit against this plaintiff, which they were compelled to bring in a state court, because all the parties are citizens of this state, in which suit they have prayed that the agreement of compromise made between them and the plaintiff may be set aside, and the plaintiff perpetually enjoined from enforcing said agreement, or in any way availing himself thereof.

In support of this position the defendants have exhibited to this court the complaint filed in the state court, as well as a provisional injunction issued by the state court, directing the plaintiff, among other things, to refrain in any manner from interfering with or disturbing these defendants in making, using and selling the bungs which the defendants were licensed to sell by the license already referred to, and from interfering with the defendants' dealings with other persons respecting said bungs by intimidating or preventing the customers of the defendants from dealing with them for said bungs. Notwithstanding the scope of this injunction issued out of the state court, the question whether the pending proceeding to punish the defendants for contempt shall go on or be stayed is to be decided by this court, and not by the state

court; nor has the contrary been contended here. But it is contended that the contempt proceeding will, of necessity, involve the question as to the effect of the invalidity of the agreement of compromise upon the liability of the defendants to punishment, and that this question cannot, with propriety, be passed on by this court at this time, upon a motion to commit the defendants, but should be left to be determined by the suit brought in the state court.

To this position taken by the defendants I have given careful attention, and with a sincere desire not to deprive the plaintiff of any right that he may have to ask an adjudication of this question at the hands of this court, and my conclusion is that the plaintiff will be deprived of no right by staying, for the present, the proceeding to punish the defendants for contempt; and that the action taken by the state court renders it proper that such proceedings should be stayed until the state court shall have determined the questions of which it has become possessed by the suit there instituted. That the state court has jurisdiction to entertain that suit, and to determine whether the license has or has not been lawfully revoked, and whether the agreement of compromise shall be set aside or upheld, must be deemed to be settled by authority. *Hartell v. Tilghman*, (and cases cited,) 99 U. S. R. 574. It is true that a determination respecting the validity of the agreement of compromise may be made to depend upon the construction to be given to the two patents in question, and so a question arising under the patent laws be determined by a state court; but such a question is not necessarily to be decided by the state court, for it may be held that ignorance of the existence of the Taylor patent, whatever may be its terms, affords no ground upon which to set aside the agreement of compromise.

It seems, therefore, that the jurisdiction of the state court to entertain the action there brought is not open to be questioned. Thus much being conceded, it is impossible to deny the competency of the state court to determine whether in equity the plaintiff should be allowed to derive advantages from the agreement of compromise, or to treat the license as

revoked during the pendency of the suit there brought; and inasmuch as the state court, after hearing, has decided that during the pendency of the suit the plaintiff is not entitled to derive any advantage from the agreement of compromise, or from his notice of revocation of the license, that determination would seem to entitle the defendants to a stay of a proceeding of the character now pending against them in this court; for that proceeding arises out of acts which the provisional injunction issued by the state court permits the defendants to do during the pending of the state court suit. So that, should a commitment of the defendants be the result of the pending proceeding in this court, the defendants will be punished by this court for doing acts in all respects similar to the acts which a competent court, in an action between the same parties, has declared the defendants to be entitled to do, until the question of the validity of the agreement of compromise has been passed on, and that upon a motion. Still further, the pending contempt proceeding will be of no avail to the plaintiff unless it be followed so far as to compel the defendants to desist in future from manufacturing bungs of the description covered by the license. The very acts permitted by the provisional injunction of the state court are, therefore, in reality the acts sought to be stopped by the pending proceeding in this court. It can hardly be that the plaintiff is entitled, as a matter of right, in this way, and by motion, to bring in review before this court the action of the state court, or, by means of a motion to attach the defendants, call upon this court to pass upon questions of which the state court has become possessed by a formal suit there duly instituted.

It has been strongly insisted on behalf of the plaintiff that his rights in this court rest upon the final decree of this court, and cannot be affected by any action of the state court in the suit referred to. But the fact that the final decree of this court was made by consent, and not upon a determination of the court, and that such consent is contained in the agreement of compromise, cannot be disregarded. In a certain modified sense the decree is part of the contract now before

the state court, so that, while much question may be made as to the effect of a decree of the state court setting aside the agreement of compromise upon the decree entered in this court, equity would seem to require that, in case the agreement of compromise be set aside by the decree of the state court, such a decree be treated in this court as a sufficient ground for refusing to commit the defendants for acts done in violation of a perpetual injunction, that has its foundation in that agreement.

These considerations have impelled me to the conclusion that the defendants are entitled to the relief they now seek. In coming to the conclusion reached, after full advisement, I have not been unmindful of the consideration pressed upon me so earnestly, that, unless the permanent injunction of this court be now enforced, the plaintiff, although he has a most formal admission from the defendants of the validity of his patent, and, in addition, has the decree of this court, obtained upon a compromise and without fraud, sustaining his patent in all respects, and although infringement of his patent is admitted, is in no better position than he would be if the agreement of compromise had been declared void, the decree against the defendants in this action set aside, and a decree adverse to his patent rendered.

But this consideration, strong as it is, is one to be addressed to the state court, which has acquired jurisdiction over the agreements of compromise upon which the plaintiff's decree is founded, and where full power exists to relieve any hardships that have arisen from its action. An order must accordingly be entered staying the further prosecution of the pending proceeding to punish the defendants' contempt until the hearing and determination by the state court of the action there instituted by these defendants, or the further order of this court. But in making such order I do not intend to express any opinion as to the plaintiff's right to proceed with any formal action already brought in this court, or by a formal action in this or any other court of the United States to seek such relief as it may be competent for those courts to grant upon the bill filed. The reasons I have now

assigned for granting the application of the defendants are of equal force to compel a conclusion against the alternative application made by the plaintiff, and that application is therefore denied.

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**AMERICAN DIAMOND ROCK BORING COMPANY v. SHELDON and others.**

(*Circuit Court, D. Vermont.* February, 1880.)

**PATENT—MOTION FOR REHEARING.**—The granting of a motion for a rehearing after a decree for an injunction and account, upon the infringement of a patent, rests in the sound discretion of the judges who heard the cause.

**SAME—ARTICLES MADE BEFORE AND SOLD AFTER EXPIRATION OF PATENT.**—Articles illegally manufactured during the life of a patent cannot lawfully be sold after the expiration of the same.

**In Equity.**

**WHEELER, J.** A motion for a rehearing has been filed since the decree for an injunction and an account, in support of which counsel for the defendants have submitted a brief; and a motion to restore the injunction as to machines made during the life of the patent infringing upon it has been heard. The motion for rehearing rests entirely upon the ground that the decision made is, as is alleged, for many reasons erroneous, and is supported by the certificate of two counsel.

The English practice of granting a rehearing upon the certificate of two counsel, as a matter of course, does not prevail in the federal courts of this country. *Brown v. Aspden*, 14 How. 25; *U. S. v. Wright's Adm'r*, 1 Black, 489; *Public Schools v. Walker*, 9 Wall. 603. According to the present practice in this court the granting such motion rests in the sound discretion of the judges who have heard the cause or made the decision. This seems to be the general practice in the circuit courts of the United States. *Daniels v. Mitchell*, 1 Story, 198; *Jenkins v. Eldridge*, 3 Story, 299. This is all that is claimed by counsel for the defendants.

The brief has been carefully examined, and it presents scarcely anything not before presented by counsel, and fully considered. The validity of the reissued patent was established by Judge Shipman, upon substantially the same record in the southern district of New York. *Am. Diam. Rock Boring Co. v. Sullivan Machine Co.* 14 Blatchf. 119. That decision was followed and concurred in in this case, and the decision in that respect could not be changed in this case without overruling that as well as the one in this case. The only other questions are those relating to infringement and to the effect of the New Hampshire decree. The question of infringement by the means held to be an infringement in this case was not determined by Judge Shipman in either case before him. It was merely postponed to final hearing; so that question was fully open. It was very carefully considered, and nothing new is presented in regard to it.

It seems to be understood or assumed that the patent has been held to cover a conical boring head, but that is not correct. It has been merely held that filling into the center to make a conical head to bore by the same means as the annular head infringes the patent for the annular head, although it may be, and probably is, an improvement upon the annular head. And likewise in regard to filling out the stock even with the laterally projecting diamonds.

And there is nothing new about the New Hampshire decree. The fact remains that the causes of action there were different from those here, so they had not passed under judgment. And the issue here is not shown to have been actually decided by the court there, for nothing was decided there relating to the merits of either case.

It is urged that the plaintiff does not proceed to an accounting under the decree, so that the defendants can appeal. This motion, however, was filed before there was any time for such accounting, and its pendency may have thus far prevented. Whether it has or not, that is no ground for a rehearing, although it might become a ground for dismissing the bill for want of prosecution. On the whole, it is quite apparent that a rehearing, under the rules, would not, with

any reasonable degree of probability, change the result, but would only delay this and other causes, and add to the expense of the parties.

The patent was granted under the acts of congress of 1836 and 1861, and carried the full and exclusive right and liberty of making, using, and vending to others to be used, the patented invention, during the term of the patent. Act of 1836, § 5. The defendants have machines made during the term of the patent, and which were infringements when made. If they could be made then and used now, in defiance of the owner of the patent, the exclusive right granted would not be fully enjoyed. The grant of the exclusive right is substantially the same in this country as it is in England. The question raised here arose there in *Crossley v. Derby Gas-Light Co.* Webst. Pat. Cas. 119. The case is more fully reported in 4 Law Jour. N. S. Chan. 25. There the patent would expire on the ninth of December, 1829; and on the twenty-eighth of November, before a bill was filed praying for an injunction against using infringing machines and for an account, the vice chancellor granted the injunction, and directed the account, and the defendants appealed.

After argument, the lord chancellor, Lyndhurst, said: "This is an appeal from his honor, the vice chancellor, and is a case for an injunction against the invasion of a patent-right by preventing the use of certain gas-meters. This case is very peculiar, and is distinguishable from all other cases in the books. It appears that the plaintiff obtained his patent on the ninth of December, 1815, and that on the twenty-eighth of November, 1829, only a few days before the patent expired, he filed a bill. It was objected that the court would not interfere, just on the eve of the expiration of the patent, and grant an injunction which would only last a week. The point has never yet been decided; but I am of opinion that the court would interfere, after a patent had expired, to restrain the sale of articles manufactured previous to its expiration in infringement of a patent-right, and that a party would not be allowed to prepare for the expiration of a pat-

ent by illegally manufacturing articles, and immediately after its expiration to deluge the markets with the products of his piracy, and thus reaping the reward of his improbable labor in making it. The court would, I say, in such case restrain him from selling them, even after the expiration of the patent." This doctrine does not appear to have been denied or questioned afterwards, and was frequently carried out, in effect, by decreeing the destruction of infringing machines. *Betts v. De Vitre*, 34 Law Jour. Ch. 289; *Needham v. Oxley*, 11 Weekly Rep. 852.

In Curtis on Pat. § 436, it is laid down as clear law that, "if the patent has expired, the account and the injunction will extend to all the articles piratically made during the existence of the patent, though some of them may remain unsold." The illegality attaches to the things themselves. The person making them has no right to make them—no right to them when made; he can import none, and none will accrue by their passing into time when they might be made. The ordinary injunction in such cases, in effect, restrains all infringement of the patent, and is, in form, perpetual. It would, doubtless, cover an illegal sale or use after the expiration of the patent. In this case the ordinary injunction has been suspended in the course of proceedings to limit the term of the patent, and there is, therefore, no injunction now in force.

The motion for rehearing is denied, and the injunction restored as to machines made in infringement of the patent.



**MAINWARING v. BARK CARRIE DELAP, etc.**

(*District Court, S. D. New York. March 6, 1880.*)

**GENERAL CARGO—STOWAGE—DANGEROUS ARTICLE—LIABILITY OF SHIP.**

—"The ship is not responsible for injury necessarily resulting to the goods of one shipper, by a general ship, from their being carried in the same vessel with the goods of other shippers, which, by usage, are a proper part of the same general cargo; but if such injury, nevertheless, could have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods, then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty."

Certain bales of empty bags were shipped on an open-beam vessel, put up as a general ship, under a bill of lading stipulating for their delivery in good order, the "perils of the sea" excepted. The bags were placed on a temporary deck of planks, covered with mats, directly over certain tierces of bleaching powder stowed in the lower hold. *Held*, that the ship was liable for the destruction of such bags caused by the fumes of the bleaching powder, set free by the pressure and working of the cargo during heavy weather, without any negligence upon the part of those in charge of the vessel, in the absence of direct proof that such stowage was necessary to the trim of the vessel.

In Admiralty.

*E. G. Bell*, for libellant.

*A. J. Heath*, for claimants.

CHOATE, J. This is a suit to recover damages for injury done to bales of empty grain bags, shipped by the libellant at Liverpool for New York, under a bill of lading which stipulated in the usual form for their delivery in good order, "the perils of the sea" excepted. The bark was put up as a general ship. Her cargo consisted of 323 tierces and 40 casks of soda ash, 300 drums of caustic soda, 265 tierces of bleaching powder, 1,850 sacks of salt, 10,000 fire-brick, 1,703 empty petroleum barrels, 840 boxes of cutch, and 110 bales of bags, of which 67 were shipped by the libellant. There was some other miscellaneous cargo, of no great amount, which it is unnecessary to mention in detail. The bark is what is called an open-beam vessel, having two decks, the lower deck being laid only for a space about 25 feet long in the bow and about 30 feet long in the after-part of the vessel. Upon the beams

between these two permanent decks were laid planks, and over the planks were laid mats. The planks were laid edge to edge, but rather loosely, together. The soda ash and the bleaching powders were stowed in the lower hold, two and three tiers high. Between two of the beams, amidships, the bricks were stowed, on top of the casks. This cargo filled the the lower hold up to within a foot or a foot and a half of the beams. The empty barrels were stowed between decks, mostly in the fore peak. The salt was stowed between decks, partly aft and partly amidships. The cutch was stowed on the salt. The bags were stowed in two places between decks, part of them on this temporary deck of planks covered with mats, directly over the bleaching powders, and part of them aft on the permanent deck.

The vessel left Liverpool on the third day of November, 1877, and did not arrive at New York until the eighteenth day of January, 1878. She had a very tempestuous voyage, was obliged to put into Holyhead and remain there about three weeks, and on the tenth of January she encountered a gale of great violence, which lasted three days, during which she was, for a short time, on her beam ends, and took in some water, which the pumps could not reach. After this gale the vessel was somewhat listed to port. Some of the casks of bleaching powder and soda ash were broken. Upon arrival the bales of bags were delivered in good order except some 32, which were corroded and eaten on the outside so that the fabric crumbled and became dust. This is the effect upon such fabrics of the fumes of bleaching powders, which consist largely of the chloride of lime. The evidence shows clearly that the bales of bags did not come in direct contact with the bleaching powders, but that the injury was done by the fumes arising from them. It is proved, also, that such fumes, dangerous to such fabrics as bags, arise from the bleaching powders wherever the powders are free—that is, not enclosed in casks—even without the powders being wet. It further appears that these bleaching powders have a destructive effect upon the hoops of the casks in which they are enclosed, having a tendency to cause the casks to fall apart.

There is, I think, no doubt, upon the testimony, that the bleaching powders and soda ash were properly dunnaged and stowed in the lower hold, and that the breaking up of some of the casks was owing to the pressure and working of the cargo during the heavy weather encountered, and the effect of the bleaching powders on the casks themselves during the long voyage, and that it could not have been prevented by any reasonable care and skill on the part of those in charge of the vessel.

It was not shown, by any direct evidence, in what part of the ship the damaged bags were stowed; whether they were those stowed on the temporary deck above the bleaching powders, or aft on the permanent deck. It is the theory of the claimants that the fumes in the hold of a ship penetrate into all parts of the ship, and that they are especially strong in the after-part. In the absence of proof, however, which it would seem that the vessel could easily have produced, of the place from which the damaged bags came, I am unable to believe that these dangerous and corrosive fumes passed up, by and around these bales of bags on the temporary deck immediately above, without injuring them, to attack with accumulated destructive force other bales at a greater distance. I think, although the claimant's theory has some support in the opinions of some of the witnesses, the weight of evidence is that the danger of injury from bleaching powders depends in a great manner on the distance between them and the articles liable to be injured, and that it must be taken as proved that the damaged bags were those immediately above the bleaching powders on the temporary deck.

It is also clearly proved that the carrying of bleaching powders and soda ash in the same vessel with bales of bags, as parts of a general cargo, is a well-established usage of the trade between Liverpool and New York, and that the usage extends to the use of open-beamed vessels, like this bark, for the carriage of such general cargoes, including these articles.

It is claimed, on the part of the libellant, that the injury was caused by the stowing of the bales of bags too near the bleaching powders, and upon this temporary and loosely laid deck,

in such a way that they would be directly exposed to the fumes that would arise from the bleaching powders, if, as in fact happened, any of the casks should become broken during the voyage; that a proper and reasonable care, having regard to this particular danger, required that the bales of bags should have been stowed on the permanent deck, or further away from the bleaching powders. On the part of the claimants, it is contended that the injury was caused by the perils of the sea, by which the casks were broken up, and that the stowage of the different parts of the cargo was proper, and with due and reasonable care for the protection of one part of it against injury from other parts, and that the stowage of part of the bales of bags on the temporary deck was necessary to the proper trim of the ship.

Both parties have undertaken to prove a usage—the libellant, that the usage of the trade requires a greater separation between bleaching powders and bales of bags or similar fabrics; and the claimants, that the usage of the trade is to stow the bales of bags as near to or nearer to the bleaching powders than in this case, and without interposing any more effective barrier between them. But, after the examination of a very large number of witnesses, the result is that there is no usual mode of stowage in this respect, but that some masters and some stevedores take more and some take less precautions against this particular danger; that in steamers, which are built in compartments and afford much greater facilities for separating cargo, the bleaching powders are carried in separate compartments from bales of bags and similar goods liable to be injured by the fumes; that in sailing ships the bleaching powders are usually carried in the lower hold, and the bags generally, but not always, between decks, but that on this particular point of stowing the bags on a temporary deck, immediately above the bleaching powders, there is no settled usage. Although it appears that in many cases they have been stowed in positions of equal or greater exposure, yet many careful persons place them further away, or as far away as possible consistent with the proper stowage in other respects and the trim of the ship.

The rule of law seems to be well settled that the ship is not responsible for injury *necessarily* resulting to the goods of one shipper, by a general ship, from their being carried in the same vessel with the goods of other shippers, which, by usage, are a proper part of the same general cargo; but "if such injury, nevertheless, could have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods, then it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty." This is the rule, even though the proximate cause of the injury is a peril of the sea, which brings the injurious force or quality of the dangerous article into operation upon the other. *Clark v. Barnwell*, 12 How. 280; *Lamb v. Pinkman*, 1 Sprague, 343. Where the carrier is innocently ignorant of the dangerous qualities of the article shipped—as, for instance, where the article is new in commerce, and its properties not known within commercial experience in the particular trade, and in fact unknown to those charged with its carriage, or where there is nothing to indicate or create a suspicion of its being dangerous—it is not negligence in the carrier to omit such precautions as the exercise of reasonable prudence would require, if the dangerous qualities of the article were known. *The Nitro-Glycerine Case*, 15 Wall. 524; *Pierce v. Winsor*, 2 Cliff. 18; *Braise v. Braitland*, 6 Elb. Bl. 485. In this case, however, it is shown that bleaching powders have long been an article of commerce in the Liverpool trade, as parts of the general cargoes, and that the dangerous and corrosive qualities of their fumes are well known, a matter of common knowledge in the trade, and so also of the effect of the breaking of the casks in liberating the fumes, and the liability of the casks to come apart from the action of the powders. The reasonable care that must be exercised to exonerate the carrier must, therefore, be measured by the known danger and his means of guarding against it. In discussing a similar question, where paper stock was injured by oil and coal dust, Judge Blatchford says: "The vessel being up as a general

ship, the libellants may *not* be at liberty to say that it was negligence to carry oil in the same vessel with paper stock; but yet the proposition set forth in the answer, that, as the shippers of the paper stock knew that the oil was to be taken by the vessel, such shippers assumed all risk of damage to the paper stock from the oil, is not a sound one. The true rule is that the peculiar character of the coal oil, its pungent odor, its volatile character, the damage certain to result to other cargo from contact with it, the liability of the casks containing it to break by pressure from the working of the vessel and let out the oil, demanded especial care in stowing the paper stock and the oil with reference to each other." The *Ship Sabioncello*, 7 Ben. 360. The same principle is clearly applicable here; and the question is whether the danger to which the bales of bags were exposed from the bleaching powders and from which they suffered injury was so far likely to happen that, in the exercise of that care which a prudent man would exercise in the conduct of his own affairs, it should have been anticipated and guarded against, and then whether there were means to guard against it. The ship is not responsible for the unusual prolongation of the voyage, nor for the violence of the wind and waves; yet I think a reasonable prudence and care would, upon the evidence, have anticipated that, in the course of the voyage, some of this bleaching powder would be likely to get out of the casks, and to injure the bales of bags stowed with reference to the bleaching powders as these were stowed. If this had been anticipated the precaution to guard against the danger was obvious enough to stow the bags further away, or on the permanent deck, or to place other cargo not liable to injury beneath them on the temporary deck, if it was of a nature to obstruct the passage of the fumes.

It is suggested that the stowage that was made was necessary to the trim of the ship, but this is not proved. There is no testimony on the subject. It is, doubtless, true that in a general ship no particular shipper can demand that his goods be put in a particular place, or in the very safest place for them. The stowage must necessarily have reference to the

trim of the ship. The safety of the ship is of greater concern to all than the safety of any particular part of the cargo. And this consideration may modify what would otherwise be the duty of the ship-master in separating articles dangerous one to the other. But in the absence of evidence it cannot be assumed that the cargo could not have been, in this respect, with safety to the ship, stowed otherwise than it was stowed. The proof shows clearly that the other bales of bags were stowed more safely as against this particular peril, and it is not shown that these bales could not equally have been protected from the natural effects of the bleaching powders. If there was any difficulty in doing so, growing out of the necessity of trimming the ship properly, the claimants could easily have shown it. Therefore, they cannot now make this answer to the libellant's claim.

Decree for libellant, with costs, and a reference to compute damages.

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**MAINWARING v. THE BARK CARRIE DELAP, etc.**

*(District Court, S. D. New York. April 2, 1880.)*

DISTRICT COURT—NEW TRIAL.—Motion for new trial denied, under the circumstances of this case, in view of the fact that the parties are entitled, upon appeal, to a new trial in the circuit court.

In Admiralty. Motion for new trial.

*A. J. Heath*, for motion.

*E. G. Bell*, opposed.

CHOATE, J. This case has been tried and determined in favor of the libellant, but before entry of an interlocutory decree the claimants move for a rehearing on the ground of newly discovered evidence, and also on account of a part of the testimony being, as is suggested, overlooked.

1. The alleged newly discovered evidence is expert evidence in corroboration of testimony given on the trial that fumes from bleaching powders, loose in the hold, are as likely to injure cargo remote from the bleaching powders as that in its immediate vicinity; also that cargo was injured by the fumes on this

voyage which was on the permanent deck, especially the salt; also that the bales of bags were of such size that they could not all have been stowed on the permanent deck; and that, with reference to the trim of the ship, it was necessary to stow a part of them as they were stowed with reference to the bleaching powders. Most of this evidence is not of a character properly called newly discovered, since it was plainly discovered by the claimants before the trial.

But the motion must be denied, because the case has been carefully tried in this court, at great expense to the parties, and if it should now be heard over again the claimants will have no greater benefit from this further testimony than they will have on a trial in the circuit court on appeal, to which they are entitled as matter of right; and after a rehearing here the decision would not be final. No doubt one of the reasons for giving a new trial in the circuit court is to give the parties an opportunity to produce, upon a second trial, any evidence which was overlooked upon the first trial, or, in other ways, to strengthen their case. If the decision on the facts in this court were final, there would be some ground for this application; but, with the right of the claimants on appeal to supply all the deficiencies that they may have discovered from the experience of the trial in this court, it would be most unreasonable to subject the libellant to the further delay and expense of a new trial here, which may not be final.

2. The testimony referred to, as having possibly been overlooked by the court, was not overlooked. It was carefully considered. It is the testimony of William McRae, the chief officer of the bark, that the storage of the cargo as it was stowed had reference to the trim of the ship. One point determined by the court was that as it appeared that the bales of bags injured sustained that injury from their stowage with reference to the bleaching powders, and as it also appeared that if stowed further away they would not have been injured, it was incumbent on the ship to show that the proper trim of the ship made it necessary to stow them in this dangerous



proximity to the bleaching powders; and the court observed, "There is no testimony on the subject."

The testimony of the chief officer was simply that the stowage, as it was, had reference to the trim. This was doubtless true. The stowage of every ship must have reference to the trim of the ship, but upon the particular question as to whether, safely to the ship and the rest of the cargo, a different mode of stowage could have been adopted which would have been, in this respect, safer for the bags, neither he nor any other witness gave any testimony.

For these reasons the motion must be denied.

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DENT v. RADMANN.

JANSSEN v. PATTERSON and others.

*District Court, E. D. New York. March 9, 1880.*

**ATTACHMENT—ATTACHABLE CREDIT—CONDITIONAL LIABILITY.**—The difference between the charter money and the freight list of a steamer, payable upon the performance of the voyage and the collection of the freight according to the bills of lading, is not an attachable credit until the performance of these conditions.

**SAME—ANSWER OF GARNISHEE—PAYMENT OF DEBT INTO COURT.**—The answer of the garnishee, admitting an indebtedness for this difference of freight, is not conclusive as between two attaching creditors, upon the impounding of the amount of the debt after its payment into the registry of the court, in a proceeding *in rem* to try the title to the fund.

**PAYMENT OF FUND—PROOF OF CLAIMANT.**—In disposing of a fund in its registry it is competent for a court of admiralty to require proof of the right of a claimant to any part of the same.

In Admiralty.

*Butler, Stillman & Hubbard*, for Dent, Patterson and others.

*Beebe, Wilcox & Hobbs*, for Radmann and Janssen.

BENEDICT, J. In order to a correct understanding of the questions presented in the above entitled causes it will be necessary to state with some detail the proceedings had therein.

The first action was commenced by John Dent, Jr., to

recover of Carl Radmann damages for the non-fulfilment by Radmann of a charter of the steamer Croft, owned by Dent.

Dent's libel was filed December 7, 1877, and after statement of the cause of action, and that the damages amounted to \$4,945.42, it avers that Radmann then had credits and effects in the hands of William Patterson, John Doe and Richard Roe, owners of the steamship Blagden, then within this district. The libel prayed for process in due form of law against Radmann, and that, in case he should not be found, his goods and chattels be attached; and, if sufficient goods and chattels should not be found, that his credits and effects be attached in the hands of William Patterson, John Doe and Richard Roe, owners of the steamship Blagden, garnishees. Upon the filing of this libel, process as prayed for was issued, upon which the marshal made due return that he had been unable to find the defendant Radmann, or to attach his goods and chattels, and accordingly had, on the seventh day of December, attached his credits and effects in the hands of William Patterson. On the eleventh of December Patterson entered his appearance in Dent's action, as garnishee, and filed an answer, wherein he states that the owners of the steamship Blagden are indebted to Radmann in the sum of £355, 19s. 6d., under a charter of that steamship, being the difference between the amount of the charter and the freight list furnished to said steamer by the said Radmann, and also in the sum of \$396.22, for address commission and freight brokerage on the said cargo. Upon this statement the said garnishee submitted himself as to the further disposition of said money to the orders of this court. Thereupon, on motion of the proctors for Dent, it was ordered that the said garnishee pay into the registry of this court the amount of money admitted by his answer to be due from the owners of the steamship Blagden to the respondent Radmann, upon the charter referred to, which order was complied with on the same day. Subsequently, and on the fourteenth day of December, Dent caused to be issued in his action an *alias* process against Radmann, upon which, on the seventeenth

of December, Radmann was duly served, and on the return day appeared in the cause, and thereafter filed his answer to Dent's libel, denying all liability upon the charter of the steamship Croft, and also denying that he had any credits or effects in the hands of Patterson and the other owners of the steamship Blagden.

Nearly a year after, and on November 7, 1878, the second of the above mentioned actions was commenced by the filing of a libel by John H. Janssen, assignee of the before mentioned Carl Radmann, against the before mentioned William Patterson, John Doe and Richard Roe, owners of the steamship Blagden, to recover of the said owners the sum of £355, 19s. 6d., and also the sum of \$396.22, alleged to have become due by virtue of a charter of said steamer made by Radmann; being the same charter referred to in the answer of Patterson garnishee, in the suit of Dent; which sums Janssen claimed to have become due and payable to him by virtue of an assignment of the said charter of the Blagden by Radmann to him. Process having been duly issued upon this libel of Janssen against Patterson and the other owners of the Blagden, and returned "not found," and it being made to appear to the court that the money paid into the registry in behalf of Patterson, on the eleventh of December, 1877, in the manner already described, was claimed by Janssen to be the money of Patterson and the other owners of the Blagden, applicable to the payment of the debt then due from said owners to him, as alleged in his libel, an order was made impounding the said money in the registry until the further order of the court, and directing that all persons having or claiming to have any interest in said money be cited to appear and answer the claim of Janssen thereto on the twenty-sixth day of March following. Due service of this order having been made by publication, in the manner directed, and by delivering the order to the proctors for the libellant, Dent, upon the return day thereof Dent duly appeared, and all others made default. On the fifth of April following, Dent filed an answer to the libel of Janssen, wherein he accompanies a denial of most of the averments of the libel

with a statement of the ground of his claim to the said money in court, namely, that William Patterson and the other owners of the steamship Blagden were, on the seventh day of December, 1877, indebted to Carl Radmann to an amount equal to the fund in court, which debt had been duly attached as the property of Radmann in the action commenced by him on that day, and had thereafter been paid into the registry under the order of this court. He also asserted that Patterson and the other owners of the Blagden had no interest in said moneys since the payment thereof into the registry, and that Janssen had never had any interest in the same, and was not entitled thereto.

Such being the position of these two actions, the action brought by Dent came on to be tried in regular order upon the calendar, whereupon it was moved in behalf of Dent that the action of Dent and the action of Janssen be consolidated. Dent being represented by the same advocate in both actions, and both Janssen and Radmann being represented by a single advocate, and no opposition to the consolidation being made, the suits were ordered to be consolidated, and thereupon proceeded to hearing upon the pleadings and proofs.

The following are the questions thus presented for determination:

Was Radman indebted to Dent upon the charter of the steamship Croft, as set forth in the libel of Dent, and at the time of filing the same?

Did Dent, by means of the attachment issued in his action and served upon Patterson, the master of the steamship Blagden, on December 7, 1877, acquire an interest in the money now in the registry?

Were Patterson and the other owners of the steamship Blagden indebted to Janssen, assignee of Radmann, upon the charter of the Blagden, as set forth in the libel of Janssen, and at the time of the filing thereof?

If so indebted, is the fund in court applicable to the payment of such debt as being the property of said owners?

In regard to the indebtedness of Radmann to Dent upon the charter of the steamship Croft considerable evidence has

been given, and it is stoutly contended, in behalf of Radmann, that the failure on his part to perform the charter of the Croft according to the terms of the charter-party was caused by neglect on the part of the ship-owners to perform their part of the agreement, and to no fault on his part. But I am of the opinion that the weight of the evidence is in favor of Dent upon this issue, and that Radmann must be adjudged liable to Dent for the damages arising from the failure to load the Croft according to the terms of the contract that had been entered into between them. It follows, therefore, that Dent is entitled to a decree against Radmann awarding him damages for a breach of the said charter, the amount to be ascertained by a reference to the commissioner.

The next question in dispute is whether Dent, by means of his attachment served upon Patterson, the master of the Blagden, on the seventh of December, 1877, acquired an interest in the fund in court which entitled him to have the same, or any part thereof, applied to the payment of the debt so found due him from Radmann.

The facts material to this branch of the controversy are not in dispute. Radmann chartered the steamship Blagden for a voyage from New York to Hamburg, and agreed to provide for her a full cargo for the full freight of £2,700, payable in cash on the right delivery of cargo. The charter party provided that bills of lading were to be signed without prejudice to the charter, and contained also the clause, "any difference between amount of charter and freight list to be settled at port of loading, as customary." In pursuance of this contract Radmann procured a cargo for said vessel from various shippers, for which bills of lading were issued, at such rates of freight that when the vessel was loaded the amount of the freight list exceeded the charter money which Radmann had agreed in the charter-party to pay. Under such circumstances the custom is for the master of the vessel, before he sails, to draw his draft upon himself to the order of the charterer for the amount of the difference between the charter money and the freight list, payable some few days after the arrival of the ship at the port of destination, and upon deliv-

ery to the charterer of such draft, accepted by the master, and paying to the charterer the address commission and freight brokerage, to receive the bills of lading and proceed to sea. The master's draft, when so delivered, is accepted by the charterer as payment of the difference between the charter money and the freight list, and the liability of the master as well as the charterer, upon the charter party, is considered to be settled and ended.

In this instance the vessel, as before stated, completed her loading on December 7th. The excess in the amount of the freight list over and above the charter money which Radmann had agreed to pay on the safe delivery of the cargo, after deducting the inland freight, was the sum of £355, 19s. 6d. The address commission and freight brokerage amounted to \$396.22. But no draft of the master was given or tendered to Radmann, nor was the bill for the address commission and freight brokerage paid, because of the service of the attachment in Dent's suit. The refusal of the master to deliver such draft upon demand occurred after the service of that attachment, but on the same day. On the day following Patterson proceeded to sea in pursuance of the charter-party, but before sailing he swore to the answer to be filed for him as garnishee in Dent's suit, and gave to his own agents, Messrs. Tucker & Co., who, by the way, were at the same time the agents and representatives of Dent in this country, his own draft on himself, to the order of Tucker & Co., for the sum of £355, 19s. 6d. payable after the arrival of the Blagden in Hamburg, having previously given his draft for the inland freight of portions of the cargo to the railroad companies entitled to that portion of his freight. This draft of the master given to his agents, and which was for an amount equal to Radmann's portion of the freight of the Blagden when collected, Messrs. Tucker & Co. indorsed and sold for cash, and caused the proceeds thereof, together with the amount of the address commission and freight brokerage, to be paid into the registry of this court, in accordance with an understanding had with Patterson before he sailed, and in the manner hereinbefore described. There is a slight discrep-

ancy between the amount paid into the registry and the amounts stated in Patterson's answer, which I suppose is accounted for by a deduction of the brokerage on sale of the captain's draft, and a further deduction of \$10. But as this small difference has not been alluded to by counsel, I do not notice it.

From the foregoing statement it is apparent that at the time of the service of the attachment upon Patterson the only debt due Radmann, attachable in the hands of Patterson or the owners of the Blagden, was the indebtedness of the owners of the Blagden for address commission and freight brokerage. This sum, according to the evidence, became due Radmann in New York, at the completion of the loading of the steamer, and it was therefore a debt attachable, as a credit of Radmann with the owners of the steamer, at the time of the service of the attachment upon Patterson. But there was then no attachable credit arising out of the difference between the charter money and the freight list of the steamer, because the amount of that difference was due only in the event of the delivery of the cargo in Hamburg. Any liability for that difference in freight was dependent upon the performance of the voyage, and the collection of the freight according to the bills of lading. To an action in *assumpsit* by Radmann against Patterson, at the time the attachment was served, the perfect answer would be, that the excess of freight had not been collected, and might never be. There being no cause of action by Radmann against the owners of the Blagden for this difference of freight, there was no such debt attachable in their hands. Such is the established law. Drake on Attachments, § 541; *Keyes v. Milwaukee & St. Paul R. Co.* 25 Wis. —.

But it is said Patterson, in his answer as garnishee, had admitted an indebtedness for this difference of freight. If the proceeding on the part of Dent was against Patterson personally, to recover the amount of his liability to Dent by reason of the attachment served upon him, there might be force in the suggestion that Patterson would be estopped from denying the existence of such a debt. But here, upon

the motion of the proctors for Dent, Patterson has paid into the registry of the court a sum of money equal to the amount of the debt which Dent claims to have attached in his hands. By this payment any liability on the part of Patterson to Dent, arising out of the service of the attachment upon Patterson, was terminated. The controversy, so far as Dent is concerned, was then transferred to the fund in court, and when, by an order of the court having the fund, made as above stated, the fund was impounded upon the prayer of Janssen, and when thereafter, upon the motion of Dent, the suits of Dent and Janssen were consolidated, no person but Dent having seen fit to appear in the suit of Janssen after due notice, as prescribed by the order of the court in accordance with the practice of the admiralty in dealing with funds in the registry, the proceeding thereupon became in effect a single proceeding *in rem*, to try the title to the fund in court, as between the two attaching creditors, Dent and Janssen. Such being the character of the present proceeding, it is plain that Patterson's statement in his answer is, to say the least, not conclusive, as against Janssen. With more force it might have been contended, although it has not been contended, that Janssen is concluded by the averment in his libel that he had the right to demand and have of and from the said steamship, before her sailing from the port of New York, the difference between the sum agreed to be paid by the charter-party and the amount of freight agreed to be paid by the bill of lading. But when the whole libel is taken together, setting forth, as it does, the charter-party at length, I think that it may, perhaps, be considered that such statement was not intended to be an admission of any fact; especially as an averment of the fact that such difference was due before the vessel sailed for New York would be mere surplusage, for the libel of Janssen was filed November 7, 1878, nearly a year after the departure of the steamer. The only liability on the part of the owners of the Blagden to Radmann, at the time of the service of the attachment in Dent's suit, being, therefore, for the address commission and brokerage, amounting to the sum of \$396.22, the interest of Dent in the fund cannot



exceed that sum. Whether he is entitled to that amount is dependent upon the question next to be considered, namely, whether the interest of Radmann in this charter of the Blagden had been transferred to Janssen before the service of the attachment in Dent's suit, as Janssen now claims.

The determination of this question of fact I should have been glad to avoid, if possible, because of the flat contradiction between the witnesses. But, brought as I am to face that question, I am constrained to say that the impression produced upon my mind by the testimony, taken together, is adverse to the position that the interest of Radmann in the charter of the Blagden was transferred to Janssen prior to the attachment of Dent, and my conclusion is that such transfer was subsequent to Dent's attachment. The assignment to Janssen has, therefore, no effect to defeat the operation of Dent's attachment upon the debt then due and owing to Radmann from Patterson, which debt, as already pointed out, amounted to the sum of \$396.22, and no more. It follows, of course, that Dent is entitled to have satisfaction of his claim against Radmann, to that amount, out of the fund in dispute.

These conclusions leave little to be said in regard to the claim of Janssen. The libel of Janssen was filed so long after the departure of the Blagden upon the voyage described in the charter that, in the absence of any evidence, or even suggestion, to the contrary, it is proper to infer that the charter had then been performed, and that the freight, payable by the bills of lading delivered to the master, had been collected by him according to their tenor and his duty. At the time of filing Janssen's libel the liability of the owners of the Blagden, for the difference between the charter money and the freight list, had therefore become fixed and absolute. This, indeed, was admitted on the trial, and the amount of that liability must be conceded to be equal to the fund in court, less the address commission and freight brokerage. It follows that Janssen is entitled to a decree for that amount, and to have his said claim satisfied to that amount out of the remaining money in the registry, the same being, as the evidence shows,

the proceeds of a sale of Patterson's own draft upon himself, to the order of Tucker & Co., his agents.

I have thus far omitted to notice the effort made by Dent to defeat the claim of Janssen by showing a subsequent assignment of Radmann's claim against Patterson, by Janssen, to Charles Graeff. It would seem to follow, from the conclusion already announced, that the interest of Dent in the fund is confined to the sum of \$396.22; that Dent has no standing in court to contest the claim of Janssen to the remainder of the fund. But, without determining the right of Dent to dispute the claim of Janssen to this remainder, it must be held to be competent for this court, when disposing of a fund in its registry, to require proof of the right of Janssen to any part thereof. I therefore notice the fact, proved by Dent, that Janssen, since the commencement of his suit, and on the twenty-seventh of January, 1879, assigned his interest in the said charter to Charles Graeff. In the assignment then executed by Janssen, however, no mention is made of the pending suit, and Graeff, when examined as a witness upon the trial, not only made no application to be made a party to this suit, but seemed to consider that Janssen retained some interest in the claim, notwithstanding the absolute assignment by him. It is not seen how such an assignment can defeat the action of Janssen. It will, however, be proper that Graeff be afforded an opportunity to apply to be made a party to this proceeding by formal notice of the decree about to be entered herein before entering the same. Such notice will be directed upon the application of either party within five days from the date of this opinion. Upon service of such notice a decree will be entered, directing that out of the fund in court the libellant Dent be paid the sum of \$396.22, less the fees of officers of court in his suit, in satisfaction, *pro tanto*, of the amount adjudged to be due him from Carl Radmann, upon the charter of the steamship Croft, in the pleadings mentioned; and that the remainder of the fund, less the fees of officers of court in the suit of Janssen, be paid to Janssen, or to Graeff, if his interest is made to

appear, in satisfaction, *pro tanto*, of the amount adjudged to be due him upon the charter-party of the steamship *Blagden*, in the pleadings mentioned.

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BUNGE and another *v.* THE STEAMSHIP UTOPIA, etc.

ZEISMER and others *v.* THE STEAMSHIP UTOPIA, etc.

(*District Court, S. D. New York. March 3, 1880.*)

**COLLISION—IMMODERATE RATE OF SPEED—FOG.**—Eleven knots an hour is an immoderate rate of speed, where the fog is so thick that vessels can only be dimly seen at the distance of a quarter of a mile.

**SAME—DUTY OF STEAMER TO STOP—VESSEL IN A FOG.**—A steamer should stop when uncertain as to the course of a sailing vessel by reason of a fog.

**EVIDENCE—STATEMENT OF MASTER—CONTRADICTION OF TESTIMONY.**  
A statement made by the master of a steamer before the receiver of wrecks, in pursuance of the merchant's shipping act of 1854, (17 and 18 Vict. c. 104,) is admissible in evidence to contradict the testimony of such master in a trial for collision.

**SAME—OFFICIAL LOG.**—Facts stated in an official log, made and signed by those chiefly having knowledge of the facts, must, as against the ship, be taken to be true, unless a mistake is clearly shown.

*R. D. Benedict*, for libellants.

*H. T. Wing* and *C. Van Santvoord*, for claimants.

**CHOATE, J.** These suits are brought by the owners of the German bark *Helios*, and the owners of her cargo, to recover the value of the vessel, and her cargo of petroleum and staves, which were totally lost by collision with the steamship *Utopia*, on the sixth day of September, 1878.

The place of the collision is stated in the libels to have been in latitude 43 deg. 34 min. north, longitude 50 deg. 18 min. west. The answers make the place a little further to the southward and eastward, but the difference is not material, and the place is admitted to have been on the great bank of Newfoundland, near its southern edge.

The collision took place in the day-time, a little after 5 o'clock in the afternoon. The steamer was bound from Lon-

don to New York. She was a passenger and freighting steamship of 1,700 tons, and running in a regular line. Her length was about 350 feet. The bark was loaded with a full cargo of petroleum and staves, and was on a voyage from New York to Rotterdam.

The libels aver that the bark, when she sighted the steamer was sailing east by south, with all sails set except the stud-ding sails, and that the wind was south-west, and that the bark was making a speed of seven miles an hour, or thereabout.

The answers aver that the wind was about south-west, S. W. by S., and blowing a good full-sail breeze. An attempt was made upon the trial, on the part of the claimants, to show that the wind, at the time of the collision, was S. W. by W.  $\frac{1}{2}$  W.; but by a great preponderance of the testimony it was shown that the wind was not at all to the westwardly of southwest, and this effort to show that it was so has no support in the proofs, and is in conflict with the answers. It must therefore be taken as a fact in the case that the wind was south-west.

The facts of the collision are thus stated in the libel: "The weather was very foggy, and a competent lookout was stationed on the bow, by whom three loud blasts of a fog-horn continued to be blown at very short intervals, and by whom, also, a careful lookout was kept. A competent man was also at the wheel, the master was walking on the main deck, and the boatswain and a seaman were also forward, and all were listening carefully for signals, etc. At a few minutes past 5 o'clock the lookout descried through the fog the sail of a vessel right ahead, and immediately reported such sail right ahead.

"The master, hearing the report, ran to the forward deck and saw the sail ahead, and for a moment he supposed it to be a fishing vessel at anchor—that being a locality where the presence of such a vessel at anchor might reasonably be expected. On that supposition he called to the man at the wheel to put the wheel to starboard, but almost immediately, and before the order to starboard could be obeyed, he saw

that the vessel was a steamer coming almost directly upon them, but apparently changing so as to bear more towards the port hand of the bark, and thereupon, in order to co-operate as far as possible with the movement of the steamship, he ordered the helm of the bark to be put hard a-port, and her helm was at once put hard a-port. The steamer was then so near, and coming at so rapid a rate, that the course of the bark was only changed about two points under the port helm when the steamship struck her on her port side, just aft of the fore rigging, a diagonal blow, cutting in nearly to the main hatch, and causing the bark to sink so speedily that her crew barely escaped with their lives, losing everything except the clothes which they had on at the time."

The libels further aver "that the steamer was running a rapid rate of more than 11 knots an hour, and at too great a rate of speed, and without keeping as careful and attentive a lookout as should have been kept, or blowing as loud and as frequent signal whistles as should have been blown, and that she did not in time adopt and continue proper measures to keep clear of the bark by passing her on one side or the other, or by stopping and backing in time, but by changing her course as she did she ran directly upon the bark, and was otherwise carelessly navigated; that the bark was in no way in fault; that the steamer was seen as soon as it was possible to see her; that the collision was then, so far as the bark was concerned, inevitable, and that the changes of helm in the bark were only made *in extremis*, and that the only effect of them was to change the position in which the two vessels came together."

The answers allege that "at 4 p. m. the breeze was moderate, with a thick fog and a drizzling rain, clearing up at intervals; that thereafter the fog was less dense and not very thick, before and when the vessels first sighted each other; that at about 4 o'clock, there being then a dense fog, two lookouts were placed on the bow and two stationed on the forward bridge of the steamship, and the master and first and third officers were on the main bridge, a quartermaster at the wheel, and all necessary appointments made for the careful

navigation of the steamship—proceeding thence forward at a moderate rate of speed of about nine knots, and blowing her steam whistle at intervals of not more than a minute; that shortly after 5 p. m., and at about 5:10, a lookout on the bow sung out, ‘A vessel ahead,’ and the vessel, afterwards known to be the Helios, was seen by the officers of the steamship on the bridge, bearing as to situation nearly directly ahead of the steamship, about a quarter of a point, or less, on the steamship’s starboard bow, showing her port bow, and having the wind free and all her sails (without studding sails) set, and drawing and moving at a rate of speed of about eight knots an hour, and sailing south of east, and on a course inclined to the southward of, and to pass to the southward of, that of the steamship, sailing on a course west by north, quarter north—the bark being, when first seen from the steamship, at a distance off of a mile and more, and so far off that on their respective courses there was no danger of a collision from proximity, nor any ground for apprehension of danger by persons in charge of the navigation of the bark, if ordinarily competent seamen, and minding their business; that immediately upon the observation of the bearing and the standing of the bark, as aforesaid, the helm of the steamship, for greater caution, was ordered to be and was put hard a-port, and if the bark had continued, as she should have done, on the course on which she was standing when first sighted from the steamship, and when the helm of the steamship was ordered to be put and was put a-port, as aforesaid, the two vessels would have passed—the steamship to the northward and the bark to the southward, at a proper and safe distance, and so far off that no collision could have been possible; that instead of so continuing her course, the bark, after the steamship’s helm had been put a-port, as aforesaid, put her wheel to starboard and altered her course to pass to leeward of the steamship, and so as to stand across the line of direction of the steamship—this through some misconception (from careless observation or other fault on the part of the bark, as afterwards learned, but unknown at the time on board the steamship) that this great steamship was a fishing vessel at

anchor; that this making of the bark to pass to leeward being observed from the steamship, the latter's helm was ordered to be and was shifted to hard a-starboard, by which the course and direction of the steamship was changed to the southward, and so far to the southward, and with speed reduced by slowing and stopping her engines, that if the bark had continued on the course she was making to pass to leeward the steamship and bark would have cleared at a safe distance off, and so far off that there could not have been a collision; that instead of keeping on this last mentioned course, the bark, through want of proper seamanship, or other fault of persons in charge of her navigation, again changed, this time suddenly porting and standing on a port helm, so as to throw herself across the bow of the steamship, and in such close proximity, through the mismanagement and fault of the bark, that the collision followed as the result of this last change, notwithstanding the use of all the precautionary measures to avoid the collision, in her power, by the steamship, on board of which, immediately upon observing this last change of the bark, the engines were reversed full speed astern; that the steamship at the time of the collision had but little, if any, headway through the water, and the bark was forging ahead on a port helm, angling across, until her port side, between the fore and main rigging, struck against the stern of the steamship, and thereby the bark was badly damaged; that the collision was caused by the want of a proper lookout on the bark, the want of proper attention to the sounding of the steamship's steam-whistle, and the mistake by the persons navigating the bark of the steamship for a fishing vessel at anchor, through their fault, and their want of proper seamanship, and the changing of the bark's course each time, after the steamship changed her course to clear the bark, so as to cross the bows of the steamship, or otherwise, through the sole fault of the master and crew of the bark, and without negligence or fault on the part of the steamship."

The Utopia is a British steamer, and by the merchant shipping act of 1854, § 282, (17 and 18 Vict. c. 104,) it is required

that there be entered in the official log "every collision with any other ship, and the circumstances under which the same occurred." By section 283: "The entries in the official log are required to be signed by the master and mate, or some other of the crew." By section 285: "All entries made in any official log-book, as hereinafter directed, shall be received in evidence in any proceeding in any court of justice, subject to all just exceptions."

In pursuance of the duty required of them by this statute the master and mate of the Utopia signed an official log, containing the following statement of this collision: "Weather thick, with rain, clearing at intervals; steamer proceeding with careful attention to the state of the weather; suddenly a ship was sighted nearly ahead, when we slowed engines and stopped; ship and steamer ported, but instantly the ship kept away, compelling the steamer to starboard; the ship at this time was dangerously close to the steamer, and a collision being inevitable the engines were reversed, full speed astern, when she suddenly ported and ran across the bows of the steamer and fell against the stern, crushing her broadside in with the force of her own impetus, and resulting in the total wreck of the bark Helios, of Pillan, Captain George Zeismer, from New York, bound to Rotterdam, laden with 2,886 barrels of petroleum, with a crew of 12 men, who were all saved by the steamer's life-boats."

The exact time when this statement was drawn up, or when it was signed, is not shown, but the act requires the entry to be done as soon as possible after the occurrence to which it relates, and in all cases not later than 24 hours after the arrival of the vessel in her final port of discharge. The testimony of the master is that in this case it was done before he reached London on his return voyage.

The libels were filed and the vessel bonded while she was in New York, and before her return to London, so that this statement of the collision was made by the master and mate of the steamship after they had an opportunity to know the allegations of the libel as to the circumstances of the collision.



The steamer left New York for London on the eighteenth of September, and arrived at London on the third day of October.

On the tenth of October, 1878, the master of the Utopia signed and swore to a statement before the receiver of wrecks, in London, which was as follows:

"On Friday, the sixth day of September, at 5 p. m., the tide at the time being unknown, the weather thick and foggy, and the wind in the south-west blowing a fresh breeze, the sea smooth, the said ship arrived off the south edge of the Grand Bank coast of Newfoundland. The vessel was in charge of deponent, who was on the bridge. T. Swain, first mate, was with deponent on the bridge; Polsen, third mate, was also on the bridge, attending to the steam-whistle, which was kept going about every two minutes; one A. B., seaman, (name unknown,) was on the bow forward, and another A. B., seaman, (name unknown) on the fore bridge, keeping the lookout. The vessel steers by steam from the bridge, the wheel being attended to by the quartermaster. The vessel was steaming about nine knots, the course being west by south, (magnetic.) Deponent and the lookouts simultaneously observed the sails of a bark, which proved to be the Helios, about right ahead, almost head on. She appeared to be about a quarter of a mile distant. Instantly, put the helm hard a-port and stopped the engines, and then reversed, full speed astern. The Helios was observed to port her helm and then instantly starboarded. Deponent then ordered his helm to be starboarded, which was instantly done, and the vessels were clear of each other. The Helios suddenly again ported her helm, and a collision became inevitable. Deponent's vessel was going full speed astern, but the Helios' port side, a little abaft the fore rigging, fell across the Utopia's stern. The Helios stove in her port side and fell over on the port side, a complete wreck."

This statement was dictated by the master, and he indorsed on the statement, in his own handwriting, and signed the following additional statement: "That, in my opinion, the cause of the casualty was the Helios improperly star-

boarding her helm, and it would have been avoided if she had kept her port helm; but, when the Helios starboarded, if she had then kept her starboard helm the collision would have been avoided. The Helios, porting her helm a second time, made the collision unavoidable."

This statement was made in pursuance of section 448 of the merchants' shipping act of 1854, (17 and 18 Vict. c. 104,) which provides that "any receiver, or, in his absence, any justice of the peace, shall, as soon as conveniently may be, examine upon oath any person belonging to any ship which may be or may have been in distress on the coasts of the United Kingdom as to the following matters, [among others:] 5. The occasion of the distress of the ship \* \*. 7. Such other matters or circumstances relating to such ship, or to the cargo on board the same, as the receiver or justice thinks necessary. And such receiver or justice shall take the examination down in writing, and shall make two copies of the same, of which he shall send one to the board of trade and the other to the secretary of the committee for managing the affairs of Lloyd's, in London; and such last mentioned copy shall be placed by the said secretary in some conspicuous situation, for the inspection of persons desirous of examining the same."

By section 449 it was provided that "any examination taken in writing as aforesaid, or a copy thereof purporting to be certified under the hand of the receiver or justice before whom such examination was taken, shall be admitted in evidence in any court of justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, as *prima facie* proof of all matters contained in such written examination." By the merchant shipping act of 1876 (39 and 40 Vict. c. 80, § 45) the 449th section above cited was repealed.

The master of the steamer also drew a diagram, intended to represent the circumstances of the collision, which was produced by him upon the trial. It was drawn to a scale while he was on a voyage to New York, about a year after the event. It shows the steamer heading W. by N.  $\frac{1}{4}$  N.,

when she first saw the bark, and the bark nearly one point on her starboard bow, and upon a course nearly south-east, and, of course, crossing the bow of the steamer to the southward.

Then the steamer is represented as porting, with her engines slowed and stopped, and moving ahead quite slow, making a course two points to starboard of her former course, and running one-fourth of a mile after porting, the bark meanwhile having kept on her course one-sixteenth of a mile, and then starboarding and keeping off four points to the leeward, running a quarter of a mile on this course, and then the steamer starboarding three points and running on this new course an eighth of a mile, coming into collision with the bark about head on, or at a right angle upon the port side, the bark meanwhile having ported four and a half points and run a sixteenth of a mile to the place of collision.

The witnesses on the part of the steamer, who observed the collision, were the master, the mate, and the third officer, who were on the bridge, one lookout on the bow, and one on the fore-bridge, the carpenter of the ship, and one of the quartermasters, who were not on duty, but happened to be on deck. These witnesses testify that when they first saw the bark she was nearly ahead, all but one of the witnesses other than the master putting her a little on the starboard bow. The master testified that she was right ahead, and, though pressed, refused to say that she bore at all on either bow. His diagram, however, shows her on the starboard bow, and the answer so avers. The witnesses testified that they could see her sails and her port bow; that she appeared to them to be on a course to the southward of them, crossing their bow. They vary greatly as to her distance at that time, from a quarter of a mile to more than a mile. The mate puts her more than a mile off, and the master "a good mile off." The master was on duty, and directing the movements of the ship. She was so nearly ahead that she was reported by the lookout as "ahead."

The wheel of the steamer was immediately put hard a-port, and the master testifies that he at the same time gave an

order to the engineer "to slow." Their testimony is to the effect that after the steamer had thus ported, and had brought the bark on their port bow, she suddenly changed her course by starboarding, standing across their bow again to the northward; that the master of the steamer, observing this movement of the bark, immediately changed his wheel to hard a starboard; that the steamer starboarded so as to bring the bark on their starboard bow again. The master testifies three points on their starboard bow, when the bark suddenly ported, running across their bow again, being then at a distance of about an eighth of a mile; that the order was then given to reverse at full speed, and the collision became inevitable, and thus they came together.

The master of the steamer testifies that if the bark had kept on her original course they would have cleared each other by the porting of the steamer, and would have passed each other port side to port side by an eighth of a mile. He also testified that he saw it was necessary to port in order to clear, and he did put his wheel hard a-port. He testified that if the bark had kept her course after she starboarded, and after the steamer starboarded, they would still have passed clear of each other starboard side to starboard side; that after the steamer starboarded they were in fact well clear of each other, the bark being broad off on the steamer's starboard bow; and that it was the porting of the bark in this position, and that alone, which made the collision inevitable. In this account of the circumstances of the collision he is to some extent corroborated by the other witnesses from the steamer.

On the part of the bark, the witnesses were the lookout, the wheelsman, the master, the boatswain, and one other seaman. Their story is that the weather was very thick; that the lookout sung out, "Ship right ahead;" that the master and the boatswain ran forward on to the forecastle deck. The master could see sails, and, thinking it was a fisherman at anchor, he immediately gave the order to the wheelsman to keep off. The master testifies that he looked back to see that the order was obeyed, and he saw the wheelsman beginning

to move his wheel; that he immediately looked forward again, and he saw the hull of the vessel ahead, and saw it was a steamer, and the boatswain at the same moment exclaimed that it was a steamer, and that she was keeping off; that he immediately gave the order to the wheelsman to luff—that is to starboard; that the bark had not then altered her course under the order to keep off; that there was not time to get the wheel over; that under the second order the bark luffed about two points; that he gave this order to co-operate with the steamer in her movements; that if he had kept his course the steamer would have struck the bark on the starboard quarter; that immediately after giving the second order he ordered the rest of the crew called from below, the danger was so imminent.

The testimony of the man at the helm confirms that of the master as to the movements of the wheel; that the wheel was not got over under the first order, and the course of the bark was not altered by it.

The testimony of all the witnesses from the bark goes strongly to show that the vessels were very near together when first seen; that the speed of the steamer was very great; that the time after sighting her was very short, and the succession of events very rapid. The testimony of those on the bark is positive as to her course; that it was east by south, the wind being south-west; that until she luffed, just before the collision, her course was not to the southwardly of this; that she had been keeping that course steadily till she sighted the steamer.

The first contested question of fact is as to the course of the bark before she was sighted by the steamer. I think there is no doubt that those who observed her on the steamer thought she was on a course crossing that of the steamer to the southward when they first made her. This is not only the concurrent testimony of seven witnesses, but the fact is strongly sustained by the order of the master of the steamer to put the wheel "hard a-port." Her bearing from the steamer is shown to have been a very little on the starboard bow, but nearly ahead and coming towards them, the course

of the steamer being N. by W.  $\frac{1}{4}$  W. If the bark, bearing thus from the steamer, was on an east by south course, she had, in fact, already crossed the bows of the steamer, and was pointing to the leeward of the steamer, and not to the southward of her or across her bows. If such had been observed from the steamer to have been her course, the steamer's wheel would not have been put to port, a movement which tended at once to bring them upon crossing courses, involving danger of collision.

Yet I am unable to reject the positive testimony of those on the bark as to her course, if it is possible to reconcile their testimony with any probable hypothesis of a mistake in this respect on the part of those who observed her movements from the steamer; and I think it can be so reconciled. Each vessel saw the other through the fog. Whatever may have been their distance apart, (a point to be hereafter considered,) it was, at the first glimpse, necessarily very indistinct, that those on the steamer got of the bark, that they thought her crossing to the southward. It is not at all improbable that upon this first glimpse they should be mistaken as to her course. It is not at all improbable that something in the trim or appearance of her sails gave them the impression that she was crossing their course to the southward.

It is too common an optical illusion to excite either remark or surprise that when the eye catches some object in an imperfect light, or indistinctly through a fog, the image conforms itself more or less in detail to what it seems to be as suggested by some one feature which the observer, for the instant, thinks he makes out. Thus, it is to be expected that if there was something which gave the impression of the bark's standing to the southward, it should also seem to those observing her that they made out the port bow, or saw along her port side, as they testify, with more or less positiveness, although this impression as to details may indeed merely be a trick of the memory, or the imagination working in aid of the impression they had at the time that the bark was standing across their course to the southward, it is the

nature of such an optical illusion that it vanishes suddenly, and the object, mistaken before, is suddenly seen as it really is. And that was so in this case. Suddenly they observed that she had fallen off to the northward. They attributed this to her having starboarded.

This is exactly what they would seem to see as they came nearer, if they had mistaken her course at first, and they represent it as a sudden and a marked change, from pointing to the southward of them to pointing to the leeward or northward of their course; from seeing her port bow and side to seeing her starboard bow and side. Yet it is certain, the bearing of the bark from the steamer and the course of the steamer being fixed, that the bark was not pointing across the bows of the steamer at this time, if her course was east by south. And the change in her wheel upon the first order given is not sufficient to account for this apparent change as observed from the steamer, if any credit is given to the testimony of those on the bark, for the following reasons: *First*, because it was not a change from a course crossing the bows of the steamer to a course to leeward of the steamer, but, if anything, a change from a course to leeward to a change a little more to leeward of the steamer; and, *secondly*, because the change of the wheel was not, upon the testimony, such as altered the course of the bark at all. Further confirmation of this view is, I think, to be found in the fact that the imagination of the master of the steamer created in his mind the idea, to which he for some time adhered, that the first movement of the bark, as he first dimly saw her through the fog, was her porting before she starboarded.

It is true that in giving his testimony on the trial that idea was entirely given up, and he was disposed to repudiate the suggestion that he had ever entertained it, yet the fact was positively asserted by him and the mate in the official log, and by him again in his examination before the receiver of wrecks.

The bearing and importance of these papers as evidence will be hereafter considered, but with reference to the present point it is only necessary to observe that whereas it is now conceded and certain that the bark did not port when first

seen, it is equally certain that the master of the steamer, on or about the third of October, in his official log, and on the tenth of October, in his examination—both within little less than a month after the event—declared in the one case, and swore in the other, that she first ported and then starboarded.

I am unwilling to accept the view that this alleged porting of the bark was a mere fabrication of the master and the mate to account for and justify their first movement of porting, which, upon what is now shown to be the real course of the bark, was a mistake.

When the official log and the examination were signed, the master may be presumed to have known, from the libels filed before the Utopia left New York, that the bark had been upon an east by south course. This being positively given as her course in the libel, and there being no reason why she should not, with a south-west wind, hold such a course until she sighted the steamer, and the impression of the master of the steamer being positive that when he gave the order to hard a-port the bark was going to the southward of him, it was a natural conclusion of his mind that she must have ported in order to be standing across his bow when he gave that order.

This notion of the bark porting may thus have had its origin in what the master knew was the claim of the bark as to her course, and what he observed as to her course when he gave that order, and may have been a conclusion of his mind, working towards a possible reconciliation of these facts. So strong must have been the impression, then, that she ported, that in the official log he and the mate actually make the starboarding following that movement of the bark, which proves to have been purely imaginary, the real cause of the collision; for the official log distinctly states that when, in consequence of that movement, the steamer was compelled to starboard, the collision was already inevitable. This idea had become modified when he was examined before the receiver of wrecks, for there, while he still adheres to the first porting of the bark, he takes great pains, apparently, by a postscript, to point out



that, in his opinion, the collision did not become inevitable until the bark ported the second time.

Without noticing here the gross contradictions between these two official statements, and between each of them, and the testimony of the master and the mate, it is enough to observe, as bearing on the question now under consideration, and the probability of those on the steamer being mistaken in their first dim observation of the bark through the fog, that the view which they got of her must indeed have been indistinct and uncertain, if the impression of it on their minds was so plastic that their imaginations, working on that impression so soon after the event, can have created the positive belief in their minds of a movement of the bark by porting, which supposed movement proves now to have been a mere creation of the imagination, or a conclusion of what they thought must have been done from what they also thought they saw being done. What reliance can be placed upon optical impressions so plastic and unreal, so little fixed and certain, so susceptible of shifting appearances?

Assuming, then, that the course of the bark, when first seen, was east by south, and that she was not crossing the bow of the steamer, but was pointing, though at a very slight angle, to leeward of her, the next point in dispute is the speed of the steamer. It is claimed on the part of the bark that the steamer was running at a speed of  $11\frac{1}{2}$  knots an hour. The steamer admits about nine knots. On this point the preponderance of the testimony is against the steamer.

It is true that the witnesses from the steamer testify to their opinions that the speed she was making was eight and a half or nine knots, but such evidence is of little value if based on mere observation of the progress of the vessel through the water.

The master, however, testifies that the telegraph, up to the time the bark was sighted, stood at "full speed ahead," and on this point the chief engineer says her utmost speed, under steam alone, was  $11\frac{1}{2}$  to 12 knots. She was carrying her fore try-sail, main try-sail, fore stay-sail and jib—all large

sails—and they were full and drawing. The sea was smooth. The master testified that these sails were carried merely to steady the ship, and he thought they gave her no increase of speed.

The opinion of another witness, a competent expert, was that they would give her, at least, an additional knot and a half an hour.

The fog had set in about noon. There was no evidence of any order whatever being given to slacken the speed after the fog set in, and before the bark was sighted.

But the chief engineer was called, and testified that after the fog set in they used coal from a particular bunker, which, he says, contained inferior coal, and that the engine was not making the full number of revolutions required for full speed.

But the testimony of this witness, under the circumstances, seems to me not sufficient to prove the inferiority of the coal to an extent that would so largely reduce the speed of the steamer. The witness is not shown to be an expert in the quality of coal. No other evidence is produced to the fact, although if true it might be produced. And if the engineer thus allowed the speed to run down, or purposely took measures to produce that result, he was acting in direct violation of the order from the bridge, which stood at "full speed ahead." Moreover, he testifies to the number of revolutions from memory merely, though he was examined more than five months after the collision, and although he kept a log in which the number of revolutions was noted, which was neither produced nor used to refresh the recollection of the witness at or before his examination. Nor was the assistant engineer, who was on watch, examined as a witness.

Aside, however, from the evidence given in the case touching this question of speed, there has been, in the course of the trial, such an evident suppression of testimony on the part of the steamer that all presumptions are on this point against her.

The mate of the steamer was examined before the trial, in New York, in February, 1879. On his direct examination he testified that the speed of the steamer was about eight and

one-half knots. On his cross-examination it appeared that the ship's log contained an entry as to her speed, signed by him and the master; that this entry was made from the report of the quartermaster. The libellant's counsel called upon the claimant's counsel to produce the ship's log, in order that the witness might be examined in reference to this entry. This request was refused, although the log was shown to be in New York, and accessible. This refusal to produce a contemporaneous record, made by the witness himself, in the course of his duty, when the same was required, lost the accuracy or good faith of his statement on direct examination, which tended strongly to exonerate his side of the case, on a critical point in dispute between the parties, will admit only one construction, and that is that if the log had been produced it would not have aided the steamer's case.

There is also evidence that one of the quartermasters not called was charged with the duty of ascertaining the speed of the ship by throwing the log, and the result of his observation was noted in what was called the "scrap log." This scrap log was called for by the libellants on the trial, but not produced, the non-production being excused by want of sufficient notice; but the fact is uncontested that a constant observation and noting of the speed were made on board the steamer, and yet only the most uncertain evidence of speed, from the estimate and judgment of the witnesses, was produced, and the evidence which could alone have afforded a reasonable degree of certainty—if, in fact, she was not going at full speed—was not produced, or was suppressed.

Further confirmation of the fact that the steamer was making at least 11 knots an hour is to be found in the computation minuted by the master on his diagram, in which, in laying down the course and movements of the steamer, he estimated her average speed, while under her hard a-port wheel, to be 10 knots, although his diagram indicates that, at the same time that he ported, he stopped his engines, and his testimony indicates that he gave the order to slow the engine at the time that he ordered the wheel hard a-port.

The next question to be determined is the distance the ves-

sels were apart when they first came in sight of each other. On this point there is a very great conflict between the testimony from the bark and the testimony from the steamer, but no substantial conflict between the testimony from the bark and the official log signed by the master and mate, and the examination dictated and sworn to by the master before the receiver of wrecks.

The witnesses from the bark estimate the distance at three or four ship's lengths. The captain of the bark puts it at a cable's length and a half, which would make it 1,100 feet. The master of the steamer says "a good mile." The mate says more than a mile, and he swore that vessels could be seen two miles off. Most of the witnesses from the steamer refused to give any judgment by ship's lengths, or by the steamer's lengths, and their estimates vary greatly. The statement of the collision in the official log, it seems to me, strongly confirms the case of the bark that the distance was very short and the succession of events up to the collision very rapid. Thus, it says: "Weather thick, with rain; clearing at intervals; steamer proceeding with careful attention to the state of the weather; suddenly a ship was sighted nearly ahead," etc.

The use of the word "*suddenly*" in this connection shows that the appearance was unexpectedly near; that it came upon them suddenly.

It necessarily suggests that they found themselves in close quarters with her. It is not such an expression as would be likely to be used if she were a mile or half a mile away. It goes on: "When we slowed engines and stopped, ship and steamer ported, but instantly the ship kept away, compelling the steamer to starboard. The ship, at this time, was dangerously close to the steamer, and a collision being inevitable the engines were reversed," etc. As we have seen, the porting of the ship was a mistake. The apparent keeping away of the ship was merely their first accurate observation of her course, which did not take place till after the steamer ported, and which must have been immediately after the steamer ported, because the rapid movement of both out of the

fog towards each other would leave time only for a momentary delusion. And so the log says, with reference to the porting of the steamer, "*instantly*" the ship kept away. The starboarding of the steamer is represented as immediately following on this movement of the ship, and the vessels were already in instant peril of an inevitable collision.

Nothing can be plainer than that this official log makes the distance very short, and the time very brief, from the point where the ship was observed to be on her east by south course to leeward of the steamer's course, to the collision. The first orders given on the steamer also show that the distance was very short. The orders were "*hard a-port*" and "*slow*."

Why should the wheel have been put *hard a-port*, especially if, at the same time the steamer slowed, the approaching ship being but a quarter of a point on the starboard bow, and, as then observed, making a course to the southward of the steamer's course, if she were a mile, or even a half a mile, off? The answer, as if anticipating this criticism, characterizes the movement as made "for greater caution." It was indeed, if true, upon the relative positions of the vessels as given by the steamer, extreme caution, and so much so as to suggest in itself a serious doubt as to the truth of the case she makes. At the distance apart of a mile, a comparatively slight porting of the wheel would have been all that was required, if anything, to clear the bark, her movement being all the time to the windward of the steamer's course.

But the master of the steamer is not only contradicted on this point by the necessary inferences to be drawn from the official log, and by the probable inferences to be drawn from the measures he took on seeing the bark, but in his examination before the receiver of the wrecks, dictated by himself, he expressly states the distance: "She appeared to be about one-fourth of a mile distant. Instantly put the helm *hard a-port*," etc.

It is claimed, on the part of the steamer, that this document is not competent evidence in the cause. This is so. The statute making it admissible has been repealed, and,

moreover, I do not see that the statute required the statement of the circumstances of the collision to be made in any case before the receiver of wrecks, and the requirement of any such statement seems to be limited to vessels that fall into distress upon or near the coasts of the United Kingdom. See statutes above cited. See, also, *Nothard v. Pepper*, 17 C. B. (N. S.) 39; *The Henry Coxon*, L. R. 3 P. D. 156; *The Little Lizzie*, E. L. R. 13 Ad. Rec. 56.

But, conceding all this, the statement is still competent evidence to contradict the testimony of the master, and to show that he has made statements of the circumstances of the collision conflicting, on the most vital points, with his testimony given upon the trial.

In this view this document *destroys* entirely his testimony as to the distance of the two vessels apart when first seen. Upon the whole evidence, I have had no difficulty in reaching the conclusion that the vessels were not more than a quarter of a mile apart when they first made each other dimly through the fog. It is unnecessary to refer in detail to all the evidence relied on and discussed by counsel as bearing on this question. On the part of the steamer it is claimed that both vessels swung further on their changes of wheel than is consistent with this view. But there is much the same element of uncertainty in these estimates of the number of points a vessel swings to port or starboard—either the vessel on which the witness stands or the vessel he is watching—that there is about the judgment of distances and periods of time.

The evidence relied on is mostly of this uncertain character. The attempt to fix with certainty the number of points that the steamer swung to starboard under her hard a-port wheel, and to port under her hard a-starboard wheel, by the evidence of the wheelsman, is a good deal weakened by the fact that he could not give the heading of the steamer after either change, but only had a recollection of the number of points she changed. At any rate, I think his testimony is not sufficient to outweigh the great preponderance of the proof, otherwise in favor of the bark. The movements of

the bark and the testimony of her witnesses strongly corroborate the official log as to the suddenness and close proximity in which the vessels appeared to each other, and the imminence of the danger from the beginning. Measuring the time and the distance by what was actually done on both vessels, and the time required to do it, and by the speed of the vessels as they approached each other, the distance of a quarter of a mile, and a minute or less in time, will most perfectly account for and harmonize with the proved facts of the collision.

It is proved, among other circumstances, that the sails of the bark were full when she struck. This would have been impossible if she luffed so much, as is claimed on the part of the steamer. The next question is whether the collision was already inevitable when the bark luffed. If, as testified to by those on the steamer, she was then three points on the star-board bow of the steamer, and an eighth of a mile away, clearly the collision was not inevitable, and the bark, being already clear of the steamer, threw herself directly in the way of danger. The luffing of the bark can be justified only, if at all, on the ground that it was *in extremis*; that either the collision was already inevitable, and the movement of the bark only changed the place and direction of the blow, or that she had been brought into such a position of extreme peril by the fault of the steamer, and the danger of collision was so great, if she kept her course, that the error of judgment, if it was one, in luffing to avoid the peril, was pardonable. *The Bywell Castle*, E. L. R. 4 P. D. 219.

The latter alternative I do not find it necessary to determine, because there is proof enough that when the bark ported the collision was inevitable. This question is, of course, very closely connected with the question of the distance at which the vessels sighted one another, and the question how far they swung from their respective courses on their changes of wheel. The master of the steamer testifies that if the bark had kept on her course to the southward, across his bow, and the steamer had kept on her course with her hard a-port wheel, they would have gone clear and passed

each other at a distance, as he judged, of an eighth of a mile. As he was entirely mistaken in respect to the course of the bark when he put his wheel hard a-port, his testimony does not show us how far apart he thinks they would have passed, the bark being upon the course she was on, to the leeward, as he afterwards discovered she was. But he and the mate have answered that question in the official log, where they say, "but instantly the ship kept away," which, as we have seen, is to be interpreted as meaning, in the light of the facts, that "the ship was seen to be on a course to leeward;" and they say of this "keeping away" of the ship: "The ship kept away, compelling the steamer to starboard. The ship at this time was dangerously close to the steamer, and, a collision being inevitable, the engines were reversed, full speed astern, when she suddenly ported," etc.

It was the judgment of the master of the bark that if he had kept his course, instead of luffing, the steamer would have struck the bark on the starboard quarter. His judgment at the time is thus confirmed by that of the master and mate of the steamer when they signed the official log so soon after the collision.

The learned counsel for the claimants have made very light of this official log as evidence, and the master himself has, upon the trial, treated it as a mere formal matter, a document of no consequence, a statement of the collision which was near enough to the truth for the purpose for which it was made. I cannot so regard it. Great importance, it seems to me, has been given to the official log by the merchant shipping act. It is expressly made evidence in any court, subject to all just exceptions. The compliance with the statute requiring it to be made is enforced by penalties, and it seems to me that facts stated in it must, *as against the ship*, be taken to be true, expressly where it is made and signed by those chiefly having knowledge of the facts, unless a mistake is clearly shown.

The case cited to show that the log is not competent evidence has no application. That was a case in which the



entry in the log made by a deceased mate was offered as evidence for the ship. *The Henry Coxon, ut supra.*

It is argued that the act only requires a statement of the fact of collision, the names of the vessels, the time, whether day or night, and the casualties attending it. This, it seems to me, would be a very narrow construction of the words "circumstances under which the same occurred," and I see nothing in the cases cited as limiting the construction of the act.

In the present case it is inconceivable that the master and mate should admit in this document, which was drawn up by the master's dictation, that the collision was inevitable before the bark ported, unless that was in fact their judgment at the time. They had every inducement to state their case as favorably for their steamer as their partial judgment of the facts would allow, and yet, knowing that the bark changed her course just before the collision, and knowing also that this was a fatal fault if not *in extremis*, they say explicitly that the collision was inevitable when she ported, and charge the collision to her fault in first porting, and then, after the steamer had ported to conform to that movement of the bark, suddenly, and in violation of the rules of navigation, starboarding.

This concurrence of those in charge of both vessels ought to be conclusive on the court. There is, however, in the evidence, other confirmation of the judgment thus expressed by the officers of both vessels. The order to luff was given because the master of the bark saw that the steamer was falling off; that is, going to leeward under her port wheel. If the order to put the wheel hard a-starboard had been given on board the steamer when the order to luff was given, there was certainly nothing in the movement of the steamer, as seen from the bark, to indicate that her wheel was changed. The starboarding of the steamer and the luffing of the bark must have been, therefore, almost simultaneous, and not in the order testified to by those on the steamer, who put the luffing of the bark after the steamer had got fairly on her course to windward under her hard a-starboard wheel, which

would be a maneuver on the part of the bark so absurd as to be proved only by a very great weight of concurring testimony.

The steamer, by putting her wheel hard a-starboard, virtually admitted that it was too dangerous to keep on across the bows of the bark while she was going to leeward, and this movement of the master of the steamer strongly confirms the judgment of the master of the bark that if both the vessels had kept on the bark would have been struck on the starboard side. If, as may be properly assumed, the situation was so urgent, as the master of the steamer understood it, as to require him to put his wheel hard a-port when he first saw the bark, the danger of collision must have been many times greater when, to escape a collision by persevering in that course, he changed his wheel to hard a-starboard. The vessels were much nearer together, and the swing of the steamer to starboard had to be broken before she would begin to swing to port. If the vessels were very near together, as seems to have been the case, the tendency of the movement was to bring the steamer directly down on the bark.

Many other parts of the testimony have been commented on by the counsel as bearing upon the disputed questions of fact. It would prolong this opinion too much to notice them in detail. They have all been considered with care in reaching the foregoing conclusions.

The fault was clearly on the part of the steamer. With a fog so thick that vessels could only be dimly seen at a quarter of a mile, she was running at a speed of over 11 knots an hour. This was not that moderate rate of speed which the rules of navigation require. This was the primary and chief cause of the collision. When the vessels first sighted each other each made a mistake in respect to the other. The bark took the steamer to be a sailing vessel, and the steamer mistook the course the bark was on. This mistake of the steamer cannot, in *itself*, be accounted as a fault. But the steamer was in fault, considering her immoderate speed and the nearness of the bark, and the indistinctness with which she could be seen, in not at once stopping. By merely slowing, instead

of stopping, she was brought so "dangerously close" to the bark, as the official log states, when she discovered her mistake, that the collision was then inevitable. The bark did not change her course to port by the first movement of her wheel. That movement of her wheel, if it had had some slight effect, would have been excusable, because the vessel ahead did not appear, at the time, to be a steamer, and the fog was so dense that she could not be made out. The luffing of the bark was *in extremis*, and after the collision had become inevitable by the fault of the steamer.

Decrees for the libellants, with costs, and references to compute damages.

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### GREEN v. STEAMER HELEN.

(*District Court, D. Maryland. March 24, 1880.*)

**COLLISION—NEGLIGENT RATE OF SPEED—UNLAWFUL ANCHORING OF VESSEL—DAMAGES.**—Where a steamer collides with a vessel, unlawfully anchored in an improper and dangerous place, while negligently maintaining too high a rate of speed, the damages will be equally divided.

**POLICE REGULATION—STATUTORY PROVISION CONSTITUTIONAL.**—An act of the legislature of the state of Maryland, (1867, c. 295,) declaring that it should not be lawful to anchor any boat in a river of the state, within certain prescribed limits, in order to keep the channel free from obstructions to navigation, is not unconstitutional, as an attempt to regulate commerce among the several states, where such provision does not conflict with any regulation of congress.\*

In Admiralty.

*Handy & Hodson*, for libellant.

*Crisfield & Dennis*, for claimant.

MORRIS, J. The allegations of the libellant are that his schooner, the Wm. H. Roach, 28 tons register, of Crisfield, Md., was, on the morning of the second of December, 1878, lying in the harbor of Crisfield, at anchor, in a manner not contrary to law, having on board 900 bushels of oysters; that about 5 o'clock A. M., while it was yet dark, the steamer Helen came upon her from the south-west, out of the usual track

\*See *Heerman v. Beef Slough Manufacturing, etc., Co.*, ante, 145.

of said steamer, at a high rate of speed, and ran into and so damaged her that she soon filled with water and sank; that at the time a proper light, as required by law, was brightly burning in her forward rigging, which could have been easily seen, with proper vigilance, by those navigating the steamer, in time to have avoided the collision.

The claimant, by his answer, alleges that the steamer Heien, of 550-tons, was on her usual route from Baltimore to Crisfield, expecting to arrive at the railroad wharf at Crisfield on her schedule time of 5 o'clock; that the night was very dark, with occasional rain, and the wind blowing hard from the southwest; that the steamer was proceeding cautiously, at a rate not more than sufficient for steerage, with two men on the lookout far forward in the bow, one on each side, and with her captain and pilot in the wheel-house; that when on her usual course, about the center of the channel, and about 200 yards from the railroad wharf for which she was steering, the lights of two vessels were seen, one on her port and one on her starboard bow, but with ample room to pass between them; that when nearly abreast of the two lights the lookouts and officers saw the reflection of the steamer's head-light on the masts of a vessel under the steamer's bow, not more than 75 to 100 feet ahead, which afterwards proved to be the libellant's schooner Roach; that the engines were at once reversed, but there was not time to avoid the collision, although the headway of the steamer was checked, so that the blow was not violent; that the Roach was lying across the channel, and in the usual track of the steamer, and had no light upon her, and was so heavily laden that not more than a foot of her hull was above water, and the night was so very dark that it was impossible to have seen her sooner; that the schooner was anchored in a place forbidden by law, and although in a dangerous and forbidden place had no lookout or watch; that the steamer, knowing it was the constant habit and practice of the Roach and other vessels of her class to anchor in that part of the channel, although by law forbidden so to do, used every precaution to guard against accident, but

that no seamanship on her part could have prevented the collision.

The first inquiry suggested is, was the schooner's light burning? It is proved that the lamp was a proper one, and was put up in a proper place. It was found after the schooner sank hanging in the fore rigging, and then had some oil in it and a good wick. There is testimony that it was seen during the early part of the night, and there is testimony that it was burning at the time of the collision, which I will briefly state:

Abel Riley, a colored seaman on the schooner De Bow, anchored next the Roach, about 30 yards off up the stream, says he heard the collision and came up on deck; that none of the Roach's crew had then come up, and he saw her light, and that it was put out by the water when she sank.

Francis Powell, a seaman on board of the Cuba, anchored about 40 yards down the stream from the Roach, came on deck and saw the steamer coming in, and watched her until she passed, and says that the Roach's light was burning. John Thomas Allen, a colored man, says he was on the railroad wharf waiting for the steamer, and saw the light from the wharf at about 4 o'clock. Thomas Conner says he saw it from the shore about 3 o'clock. James C. Simonson, assistant postmaster, says he was waiting for the steamer and saw the light at 5 minutes before 4 o'clock from the railroad ticket office. George C. Carroll, on board the Sailor's Delight, says he saw the light between 4 and 5 o'clock. Edward Evans, on board the schooner De Bow, says he saw the collision and saw the light. William L. Sterling was on the wharf and says he saw the collision and saw the light burning.

On the other hand, there were on the steamer two very competent men (one of them the mate) stationed, one on each side of the bow, near the stem, acting as lookouts. They saw the lights on the two vessels, one on either side of the Roach, but, although intently watching, swear they could see none on her, and could see none before or after the collision. The captain and pilot, although they saw the other lights, swear

they saw none on the Roach, and so swears the man who was standing on the hurricane deck near the pilot house. The steamer was steered between the two lights, which, it appears, were the lights on the Cuba and the De Bow, because, as they say, it was a dark space in which there was no light. All these persons on the steamer testify that they saw the masts of the Roach as soon as revealed by the steamer's head-light, and all five of them testify that from the time the schooner's masts were revealed until she sank they could see no light on her. Charles Simmons, the watchman on the railroad wharf, who was standing in an excellent position for observation, watching the steamer coming in, and swinging a light for her guidance to the wharf, testifies that he saw the two lights on either side of the steamer and dark space between, into which she steered; that he then heard the crash of the collision, but saw no light of any vessel there.

As to all the libellant's witnesses who say they saw the light from the shore they were at considerable distances, varying from 500 to 1,000 feet. There were several vessels lying not far apart; their position had shifted with the wind, the darkness was such that they could see nothing but the lights, and they may easily have been mistaken as to which vessel the light was on. As to his other witnesses, their opportunities for seeing the light were no better than those of the officers and men on the steamer.

It is not necessary for me to discuss why I am disposed to give more or less weight to the statements of different witnesses who have testified with regard to the light; but I may say, generally, that it appears that there is such a state of feeling between the oystermen of Crisfield and those navigating the steamers running to that port, that the witnesses on each side of this controversy, whether on board the vessels that came in collision or not, would seem to be open to pretty much the same liability to the influences of bias and prejudice. The captain of the Roach was not on board of her, and no one had been since Saturday night, except five of her colored crew, who were sound asleep until roused up by the collision. Of these two were examined, but they did not say whether or

not they saw the light when they came up on deck after the collision. In this conflict of testimony I find myself unable to arrive at a satisfactory determination of the question whether or not, at the time of the collision, the schooner's light was burning.

When, however, a vessel in motion comes into collision with one at anchor, the presumption is that it was the fault of the vessel in motion, unless the anchored vessel is in an improper place; so that, in the inconclusive state of the testimony with regard to the light, it becomes of great importance to determine where the schooner was at anchor, and whether she was lawfully there. The natural channel of the Little Annessex river, on which is the town of Crisfield, was found insufficient for the steamboats and other vessels attracted by the railroad which terminates there. With the aid of appropriations from the general government the channel was dredged out so that now there is, from Tangier sound to the railroad wharf at Crisfield, a channel about 300 feet wide and from 10 to 13 feet deep.

The legislature of Maryland expressed its sense of the great importance of preventing this channel from being filled up and keeping it free from obstructions to navigation by passing the act of 1867, c. 295, by which penalties are enacted against throwing into it any substances tending to fill up the river, and by which it is declared that it shall not be lawful to anchor any boat in said river between the railroad wharf at Crisfield and Tangier sound, in the track of any inward or outward bound vessels, and imposes a fine of not less than \$20 nor more than \$100 for every such offence; further declaring that if any boat, while anchored in the river contrary to said act, shall be collided with and damaged by any inward or outward-bound vessel, the owner thereof shall not be entitled to recover for any such loss, but said act and the violation thereof shall be a justification of such inward or outward-bound vessel so colliding. This dredged channel is not of great length, and is in fact, more of the nature of a canal than a river. The danger of anchoring in it is apparent, and must have seriously impressed the members of the

legislature, or they would hardly have thought necessary the extreme penalty which the act prescribes.

Much of the testimony of the libellants was directed to establishing the location of the Roach in the river at the time of the collision. I am satisfied that the Roach, on Saturday evening, cast anchor near the south-east edge of the channel, about 600 feet from the railroad wharf, and from 400 to 500 feet from Rice's wharf. The wind was then north-east, which caused the vessel to tend parallel with the channel, and down the stream. The Roach drew eight feet of water, and the proof shows that 30 feet eastward of the edge of the channel from this point the depth of water does not exceed six and one-half feet.

As the captain of the Roach was very familiar with the river, and the depth of water, it seems hardly credible that he would anchor his vessel to remain from Saturday night until Monday in a place where, if the wind went around to the northwest, she would have grounded. I am satisfied she was anchored somewhat to the north-west of the edge of the channel. The wind changed on Sunday night, and at the time of the collision was blowing hard from the south-east, which tended to carry the Roach directly across the channel. The channel there is about 425 feet wide. The Roach is 50 feet in length, and her cable was 120 feet, so that even if anchored on the very edge of the channel she must have been lying about 170 feet off from it, across the channel, which would put her very nearly in the center.

It is urged that this was not the usual track of the steamer, and that she was in the habit of coming in by a course further to the westward; but it could not have been much to the westward, and it would, I think, be unreasonable to restrict the steamer, on a very dark night, to pursuing her course within any such nice limits as that would imply.

I find, therefore, that the schooner was, in the language of the act of 1867, "anchored in the track of an inward-bound vessel, between Tangier sound and the railroad wharf," and that she was, therefore, unlawfully so anchored.

With regard to the application of the act of 1867 of the



general assembly of Maryland to this case, two objections are made: *First*, that it is an unconstitutional attempt of the state to interfere with the powers delegated by the constitution to congress to regulate commerce among the several states. Undoubtedly it has been held that "commerce" includes navigation and every species of commercial intercourse, (9 Wheaton, 1,) but it has also been held that, until congress does exercise the power given to it in such way as to manifest the intention to supersede or prevent state legislation, the states may, by law, prescribe such police regulations as are necessary to prevent the obstruction of its harbors and navigable waters, and the safety of vessels lying at anchor or moving thereon. These regulations have been held constitutional, and have been recognized by the admiralty as imposing duties on vessels which must be complied with. *The General Clinch*, 21 How. 184. In Cooley's Constitutional Limitations it is stated, as the result of the decisions, that "the state has the same power of regulating the speed and general conduct of ships and other vessels navigating its water highways, that it has to regulate the speed and conduct of persons and vehicles upon the ordinary highway, subject to the restriction that its regulations must not come in conflict with any regulations established by congress for foreign commerce or that between the states."

I am of opinion that so much of the law as declares in what parts of the Annamessex river it shall not be lawful for vessels to anchor is a constitutional exercise of the rights of state legislation which the Roach was bound to observe.

As to the penalties prescribed by that act for violation of its provisions, they cannot be enforced in the admiralty. This court must apply to the case the general maritime rules applicable to a collision between two vessels, one of which is anchored in an improper place, not regarding so much of the act as declares that the vessel unlawfully at anchor shall in no case be entitled to recover for any loss resulting from a collision. *The Gray Eagle*, 9 Wall. 510; *Williamson v. Barrett*, 13 How. 109; *The Continental*, 14 Wall. 359.

The *second* objection urged to the act of 1867 is the con-

tention that it has been superseded by the acts of the general assembly of Maryland of 1872, chapters 151 and 409. The first is an act to incorporate the town of Crisfield, and provides that the town commissioners may ascertain the depth and course of the channel of the harbor and river Annemessex, and fix buoys for facilitating the navigation thereof, and may cause the harbor to be cleansed and cleared of all obstructions, whether from vessels sunk or any other cause, and may require the wharves to be kept in repair. Chapter 409 is an act to define and preserve the harbor of Crisfield, and the Little Annemessex river in Somerset county, and provides that certain commissioners shall define and establish the lines of said river to which wharves and other improvements from either shore may be erected, and provides penalties for building in violation of such established lines, and for throwing into the harbor thus defined anything tending to fill up or obstruct the same.

Neither of these acts, so far as I can see, either conflict with or supersede the provision of the act of 1867, that no boat shall anchor in the track of vessels between Tangier sound and the railroad wharf at Crisfield.

It is not shown that, under either of the two later acts, any attempt has been made to set apart any anchorage for vessels. There was some testimony to show that an officer of the corporation of Crisfield had notified vessels that they must not cast anchor in the basin between certain wharves, but there was no evidence to show that the place where the Roach was lying had ever been, by any color of authority, designated as a proper anchorage for vessels.

I now come to consider whether there was any fault on the part of the steamer which contributed to cause the collision; for, although the Roach was anchored in an improper and dangerous place, the general maritime rule is that, whether the anchored vessel is in an improper place or not, the vessel in motion must avoid her, if practicable, and can only exculpate herself by showing that it was not in her power, by adopting any practicable precaution, to have prevented the collision. *The Clanta and The Clara*, 23 Wall. 14.

It is admitted in the answer that the steamer was about 500 feet from her wharf in the harbor of Crisfield; that it was known to those navigating her that it was the constant practice of the Roach and other vessels of her class to anchor in that part of the channel; but it is alleged that she was proceeding cautiously and at a slow rate of speed.

Let us see how the testimony supports this allegation as to the rate of speed. The captain of the steamer says that when they saw the masts of the Roach, about 75 feet off, the steamer was going the usual speed which she maintains while coming up the river; that is to say, from six to seven miles an hour. Out on the bay, he says, they try to make 10 miles an hour. The engineer says that on the bay they were making 32 revolutions of the wheel a minute, and on the river, 28 revolutions, and that at the time he got the signal to reverse, just before the collision, they had not slowed from the speed they had been making on the river, and were going, he thinks, six and a half miles an hour. The Helen is a side-wheel steamer, quickly stopped, and, even at her then rate of speed, was so far checked before striking the Roach that the direct effect of the blow was not great.

I am satisfied that if she had been proceeding at a slower speed the damage must have been very trifling. In my judgment, under all the circumstances and considering the obstructions they knew she was likely to encounter, she was maintaining too great a speed. The night was very dark. She was steering for her wharf. They knew that the harbor is very contracted, and that small vessels would very likely be in her track, and yet she had not slowed from the speed she had maintained the whole length of the river. *The Corsica*, 9 Wall. 634. In the harbor of Baltimore an ordinance provides that no steamboat of 150 tons and upwards shall proceed at a greater speed than 10 revolutions of her wheel per minute, which serves to indicate the rate of speed which experience has shown to be safe in a narrow harbor in the day-time.

It results, from these considerations, that both vessels were in fault, and that the damages must be equally divided.

The steamer was not injured at all, so that the only damage to be determined is the loss sustained by the owners of the schooner. The libellants' itemized account of loss amounts to \$1,407. This exceeds, in some of the items, what, in my judgment, is proper to be allowed. The 900 bushels of oysters are charged at 30 cents a bushel, but the proof is, I think, that their value, as they lay in the vessel, did not exceed 25 cents; this would result in a deduction of \$45. Two months' detention of the schooner is charged at \$600. Two months was, I think, an unnecessarily long time to be consumed in raising and repairing the schooner. It could have been accomplished in less than half the time, and I deduct \$300 from that item. This reduces the account \$345, leaving \$1,062 as the damage.

I will sign a decree against the stipulators in favor of the libellants for half that amount.

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PERKINS and others v. SCHOONER HERCULES.

WARREN FOUNDRY & MACHINE COMPANY v. SAME.

(*District Court, D. Massachusetts. April 14, 1880.*)

**COLLISION — SAILING VESSEL AND STEAMER — IMMATERIAL OMISSIONS — BURDEN OF PROOF.**—In the case of a collision between a sailing vessel and a steamer, the burden of proof is on the latter to show want of negligence, and the omission of the master of the schooner to warn the man at the wheel of the approach of the steamer, or to show a lighted torch, in accordance with section 4234 of the Revised Statutes, is immaterial, when such omissions did not contribute to the collision.

In Admiralty.

NELSON, J. These are two libels; the first by the master, crew and owners of the schooner Charles S. Rogers, and the second by the owners of the cargo on board the schooner, against the steamer Hercules, for running into and sinking the schooner, off Cape Cod, three miles south-east of Highland Light, at half past two of the morning of May 31, 1879. The night was clear, with the wind fresh from south south-

east. The schooner was standing north north-west, on her port tack, bound for Boston, at a speed of nine knots. The steamer was steaming in a south-easterly direction, at a speed of eight knots, on a course substantially parallel with the course of the schooner. The steamer struck the schooner on her starboard side, near the fore-rigging, causing her to sink immediately.

The answer sets up three grounds of defence—*First*, that no proper lookout was kept on board the schooner; *second*, that the schooner did not keep her course; and, *third*, that the schooner did not show a torch. Upon the first point, I think it was satisfactorily proved that the mate of the schooner was on the lookout from 2 o'clock until the time of the collision. This is sworn to by the mate himself, and by the man at the wheel, the only persons who were on deck at the time, and I see no reason to doubt the correctness of their testimony.

Upon the second point I am of the opinion, the preponderance of the evidence is in favor of the position of the libellants, that the schooner kept her course, and the accident resulted from the negligence of those in charge of the steamer. The mate testifies that he first saw the steamer's mast head-light when about three miles distant, one point on his starboard bow, and when the steamer had approached to within one mile he then first saw her green light; that the green light continued in sight up to the very moment of the collision, and at no time did he see her red light. Both the mate and the man at the wheel swear that the schooner kept her course until she was struck by the steamer. If this is correct, then the course of the steamer was east of that of the schooner.

The evidence on the part of the steamer is that the schooner was first seen at a distance of one mile; that the color of her light was red, and bore one and a half points on the steamer's port bow; that the steamer at once ported her helm, and changed her course to due south, and as she approached the schooner nearer her helm was put hard to port, and the signal given to stop the engine; that the schooner's green light

first became visible just as the steamer struck her, and the schooner was then headed N. W. by W., and the steamer S. by W.  $\frac{3}{4}$  W. If this account is to be taken as correct, the course of the steamer was west of that of the schooner, and the schooner must have changed her course several points to the westward during the interval of less than four minutes after she first saw the steamer's side-light until the collision. Two accounts of the same transaction could not well be wider apart than these. But there are one or two circumstances which tend to show that the steamer was east of the schooner. If this is so, it is very clear she did not see the schooner's red light, and should not have ported her helm and attempted to pass to the west of the schooner, but should either have held her course, when she would probably have gone clear, or should have put her helm to starboard and passed to the eastward.

*First.* The mate of the schooner who had charge of the deck, and was on the lookout, did not report the steamer to Dewey, the man at the wheel, and Dewey did not see the steamer or know of her approach, until the collision took place. If she had come up on the port side of the schooner she would have been in plain sight of Dewey. The fact that he did not see her is strong proof that her approach was on the schooner's starboard bow, as his view in that direction was shut off by the schooner's sails. *Second.* If the course of the schooner had been changed, as the claimants contend it was, her green light must have been seen from the steamer for some little time before the collision. *Third.* No one of the witnesses on the steamer testifies to having seen any change of course by the schooner. Her sails were seen for some little distance, and if her course had been changed to the extent claimed some indications of it must have been visible from the steamer. No witness saw the disappearance of the red light, and the appearance of the green light. Such a change must have been noticeable, and would have been a prominent circumstance in the case if it had occurred. *Fourth.* Such a change of course by the schooner is altogether impossible. It could only have occurred through the

gross ignorance or wilful negligence of those in charge of her, and there is no evidence of either.

It further appeared that the master did not report the approach of the steamer to the man at the wheel. But as it appeared his failure to do so did not result in any change in the schooner's course, or in any way contribute to the accident, the circumstance is of no importance.

As to the last point of defence, it appears that the schooner did not show a lighted torch, as sailing vessels are required to do on the approach of a steam vessel during the night time. Rev. St. § 4234. But it is also clear that this did not contribute to the accident. The schooner's light was seen from the steamer a mile off, as far, certainly, as a lighted torch on deck could have been seen, and in season to avoid the collision if proper precautions had been taken by those on board the steamer. Under the circumstances it is settled that the failure to show a torch by the sailing vessel does not excuse the steamer. *The Leopard*, 2 Low. 239.

It is well settled, in cases like this, that the burden of proof is on the steamer to show a sufficient reason for not keeping out of the way of the sailing vessel. *The Carroll*, 8 Wall. 302; *The Java*, 14 Blatch. 524.

Upon all the evidence I am of the opinion that the claimants have not sustained this burden, and that the collision in this case arose from the negligence of those in command of the steamer, in not making sufficient allowance for the high rate of speed, a mile in three minutes and thirty-two seconds, with which the two vessels were approaching each other.

The entry in each case will be, interlocutory decree for libellants.